INDEX

872108—50——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, AND AMERICAN SMELTING & REFINING COMPANY, APPELLEES

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS[1]

v.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, A CORPORATION, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEES

CONSOLIDATED CAUSES

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[1] The following parties were permitted to intervene in the court below: State of Utah (R. 377); State of Colorado (R. 383); Public Service Commission of the State of Utah (R. 386); Public Utilities Commission of the State of Colorado (R. 391); Utah Mining Association (R. 408); Colorado Mining Association (R. 401).

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The informal opinion of the District Court (R. 499) is not reported.[2]

The general report of the Commission is reported in 209 I. C. C. 11. The two final supplemental reports are reported at 270 I. C. C. 359 (R. 364)[3] and 270 I. C. C. 385 (R. 315).[4]

JURISDICTION

The final decree of the District Court was entered January 10, 1949 (R. 463). Petition for appeal was filed March 7, 1949 (R. 464) and the appeal was allowed the same day (R. 465). Probable jurisdiction was noted October 10, 1949 (R. 403). The jurisdiction of this Court is founded upon provisions of the Judicial Code as revised by the Act approved June 25, 1948, ef-

[2] The court opinion was informally stated from the bench at the close of the hearing. Later Findings of Fact, Conclusions of Law, and Final Decree were entered (R. 449).

[3] American Smelting and Refining Company, Ex Parte No. 105, 75th Supplemental Report.

[4] United States Smelting, Refining & Mining Company, Ex Parte No. 104, 76th Supplemental Report.

fective September 1, 1948, Title 28 U. S. Code Sections 1253 and 2101 (b), consolidating and continuing the substance of prior acts relating to direct appeals from decisions of three-judge courts involving orders of the Interstate Commerce Commission.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix I, *infra*, pp. 129, 138.

QUESTIONS PRESENTED

The ultimate questions relate to validity of the two orders of the Commission, entered May 18, 1948, one in American Smelting & Refining Company, *Ex Parte No. 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, Seventy-fifth Supplemental Report of the Commission (R. 363),[1] the other in United States Smelting, Refining and Mining Company, *Ex Parte No. 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, Seventy-sixth Supplemental Report of the Commission

[1] The order involved in *The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, and American Smelting & Refining Company, Plaintiffs* v. *United States of America and Interstate Commerce Commission, Defendants*, Civil Action No. 1525, in the District Court below.

(R. 321).* Each of said Commission orders require the two appellee-carriers, Denver and Rio Grande Western Railroad Company (hereinafter referred to as D. & R. G.) and Union Pacific Railroad Company (hereinafter referred to as U. P.), to cease and desist performance of terminal switching service at the industrial plants of said American Smelting and United States Smelting Companies, as performed by either or both said carriers, beyond the points in each particular plant as determined by the Commission in its reports of the same date, as a part of the common carrier line-haul obligations. In effect the Commission has determined, in the two Supplemental Reports entered May 18, 1948, that the transportation under appellee-carriers' line-haul obligations begin and end with the receipt and delivery of cars on the designated interchange tracks at each separate plant, and that spotting service beyond such interchange tracks as part of delivery would violate Section 6 (7) of the Interstate Commerce Act.

Subordinate questions are:

1. Whether the Commission orders were authorized by the Interstate Commerce Act.

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* The order involved in *United States Smelting, Refining and Mining Company, a corporation, The Denver and Rio Grande Western Railroad Company, a corporation, and Union Pacific Railroad Company, a corporation, Plaintiffs* v. *United States of America and Interstate Commerce Commission, Defendants*, Civil Action No. 1524 in the District Court below.

2. Whether the Commission orders are supported by substantial evidence.

3. Whether the district court could legally decide questions of fact, or legally substitute its judgment for that of the Commission upon administrative questions and base its decision and judgment on a partial record.

4. Whether carrier determination, by practice or tariff provision, of what is or is not a part of the line-haul transportation to and from each plant here involved, legally prohibits the determination of that question by the Commission, upon the basis of switching conditions at each particular plant.

5. Whether the Commission orders are unreasonable or arbitrary.

STATEMENT

This is a direct appeal by the United States and the Interstate Commerce Commission from a final decree of the United States District Court for the District of Utah, as a specially constituted three-judge court, permanently enjoining and setting aside orders of the Commission entered May 18, 1948, in American Smelting & Refining Company, *Ex Parte No. 104*, Seventy-fifth Supplemental Report, 270 I. C. C. 359, and in United States Smelting, Refining and Mining Company, *Ex Parte No. 104*, Seventy-sixth Supplemental Report, 270 I. C. C. 385. The District Court consolidated and heard the two actions, filed under sep-

arate complaints (R. 303 and R. 342), and decided the same under a single final decree (R. 463).

COMMISSION PROCEEDINGS

The American and United States Smelting Companies are engaged in the business of smelting and refining copper, lead, zinc, and other metals. The American operates industrial plants at Garfield and Murray, Utah, and Leadville, Colorado, the United States operates a plant at Midvale, Utah.[7] Maps of these plants are exhibits to the Commission record, were offered in the District Court, and are in the appeal record. They could not be included in the printed record, for which reason appellants have prepared photostats of the record maps of the Garfield, Leadville, and Midvale plants and will submit separately.[8]

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[7] Since the docketing of this appeal appellants have been advised that the Murray, Utah, plant of American Smelting has been or is being abandoned and is or will be dismantled. Such abandonment and dismantling would make further consideration of questions relating to that plant, as involved in this appeal, unnecessary. For this reason no further reference to the Murray plant will be made herein. Amendment of Commission or Court orders respecting that plant is believed unnecessary.

[8] The photostat maps are approximately one-half the size of record maps. For purpose of comparison and verification reference is made to record maps of which photostats are submitted. Map of Garfield plant is Exhibit 3, and map of Leadville plant is Exhibit 32 to the Commission record in the American Smelting case, a part of the appeal record. The map of the Midvale plant is Exhibit 1 to the Commission record in the United States Smelting case, a part of the appeal record.

The Commission, upon its own motion, instituted the proceeding leading to the orders here involved, as a part of and supplemental to its main report in *Ex Parte No. 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, 209 I. C. C. 11, American Smelting designated the Seventy-fifth, and United States Smelting the Seventy-sixth Supplemental Reports of the Commission. The main report, entered May 14, 1935, is based a general investigation, also instituted by the Commission, to determine the practices and customs of rail carriers, in the performance of terminal or switching services at industrial plants, and the payment of allowances to industries performing their own switching or spotting service in lieu of carrier performance of such services. The main report, as stated therein, p. 15, dealt "only with the legal questions and general situations presented."

The main report is based upon a general investigation of approximately 200 industrial plants where spotting allowances were paid, and numerous plants where carriers assigned locomotives to perform spotting service beyond the points of interchange, some of which required the full-time assignment of locomotives for their exclusive use, and the service performed under direction and control of the industry (p. 43). Hearings were held at convenient points throughout the country and covered the practices at

many individual industries. No separate reports were issued, at that time, covering individual industries, the main report stating, page 15, that such separate reports would be issued later, as they were, in the form of "Supplemental Reports," of which the Seventy-fifth and Seventy-sixth are here involved. Such supplemental reports, with reference to date of orders and citation in Commission reports, are set forth in Appendix II, *infra*, pp. 139, 144.

Numerous supplemental reports issued in ***Ex Parte 104*** have been, in each case, sustained by this Court, making unnecessary any great elaboration of facts developed and issues decided in the main report. Effort is here made to direct attention chiefly to the particular findings and conclusions of the main report, and court decisions thereon, which relate to appellee contentions herein, that fact differences remove these cases from application of ***Ex Parte 104*** principles applied in other cases with court approval. Aside from the question of evidence support for Commission findings, differences claimed by appellees, and stated in the district court findings of fact as basis for its conclusions, particularly in findings (13), (14), (15), (16), and (17) (R. 455–457, incl.), refer largely if not entirely to provisions of carrier tariffs, covering transportation to and from these industries, and the custom and practice concerning switch-

ing or spotting service at these particular plants.

As a result of the country-wide general investigation of hundreds of industrial plants operated by a wide variety of industries, the fact was established that there was a decided difference in the terminal service rendered by railroads at some plants as compared to others, in the same or different industries, on the lines of the same or different carriers, and even in some sections of the country as compared to others. At many plants spotting service, or all plant switching, was performed by industries, with all inbound and outbound traffic being delivered or received by carriers on designated interchange tracks. Under that manner of delivery it was found that some plants were paid an allowance by the carrier, ostensibly for performing spotting within the plant, mutually recognized as the line-haul transportation of the carrier, while at other plants, similarly performing their own spotting, no such allowances were paid. In other instances cars were placed upon such interchange tracks and subsequently moved by carrier motive power, assigned to and operating under plant direction substantially the same as industry-owned power, spotting cars as needed by the industry, and without charge in addition to the line-haul rate. Many plants were served by two or more carriers resulting in confusion.

The main report further recognized that delivery is a part of line-haul transportation, and

that plant interchange tracks correspond to spurs or sidings on which the practice of spotting had its origin. In this respect it was found that industries, heard upon the general record, had systems of tracks varying in extent from a few tracks of a few hundred feet to extensive systems many miles in length.

The record of the general investigation shows the wide difference in spotting service, and payment of allowances, performed or paid by carriers in different sections of the country. Based upon that record the main report found that payment of allowances began in the Indiana-Illinois industrial area and spread to nearby areas, some to north-central and northwest sections, with only New England, the Southeast and extreme Southwest excluded from this favoritism. New England carriers maintained that allowances were improper, and that placing or receiving cars upon interchange tracks constituted "delivery or receipt by the carrier under its line-haul freight rates, and that a further movement by industrial locomotives is a matter of internal arrangements of such industry and is no concern of the carrier." In the Southeast no allowances were paid, and southern carrier conception of transportation obligation to perform plant spotting was illustrated by the practice to cease spotting for plants when the service required constant use of one or more carrier engines.

Another fact noted in the main report, pp. 39–40, from the general record evidence was industrial weighing, necessary or required by the industries at many plants. The weighing service, sometimes of both loaded and empty cars, enabled plants to keep accurate records of materials and grades used in the operation, and is an indispensable part of production and merchandising of products. Ordinarily industry weights were accepted by carriers for assessing freight charges. In practically all cases the use of industry scales involved extra plant switching, and usually requires delivery or receipt on tracks from which cars can later be moved to scales, weights ascertained, and thereafter placed at locations desired by industry. Industrial weighing, common in production of heavy commodities, usually requires a second movement of cars by carriers.

Another fact-finding of the main report, p. 44, as based upon the general investigation of hundreds of industries, was that line-haul rates have not been fixed to compensate carriers for performance of spotting service. In that connection it was found that many industries now receiving allowances, or carrier-performed spotting service, had previously performed their own service without compensation or assistance, with no change being made in line-haul rates at time of beginning allowance payments or performing free spotting service, resulting in carrier assumption of a burden not previously borne.

General conclusions based upon record evidence of the general investigation are stated in the main report, and have been so often sustained by this court as to become established law.* Only those conclusions deemed pertinent to issues presented by this appeal are here referred to, as follows:

> "The question whether or not there is an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether this is merely a substituted service, which is substantially a like service to that included in the line-haul rate, is a question of fact to be determined in each case (p. 24).
>
> No legal obligation rests upon a carrier to perform switching and spotting service solely at a shipper's convenience, * * * (p. 30).
>
> To summarize, it is well settled that carload freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed

* *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp., et al.*, 304 U. S. 156; *Inland Steel Co.* v. *United States*, 306 U. S. 153; *United States* v. *Wabash R. Co., et al.*, 321 U. S. 403; *Corn Products Refining Co.* v. *United States*, 331 U. S. 790.

upon by him and the carriers. See *Chesapeake & O. Ry. Co.* v. *Westinghouse, Church, Kerr & Co., Inc., supra,* the case affirmed by it, and cases cited therein. See also *Industrial Railways Case, supra.* It is likewise clear from these same authorities that service beyond such reasonably convenient point is not a service which the carrier is obligated to perform or pay for under its line-haul rates (pp. 32–33).

* * * Manifestly it is not the amount but the kind of service required which must be considered in determining whether the performance of such service is an obligation of the carrier under its line-haul rates (p. 43).

The argument has also been advanced on brief that a general definition of what constitutes the equivalent of team-track or simple switch placement by the carriers involved herein cannot be made. We are inclined to the belief that this argument has merit, but this assumption does not conflict with our view, which is that a determination of what constitutes a carrier's duty with respect to the equivalent of team-track or simple switch placement can readily be ascertained at any individual industry by experienced railroad-operating men or committees if honestly performed without consideration of traffic reasons (p. 38).

The tariffs publishing the line-haul and switching charges constituting the carrier's

> holding out to all alike of service under such rates and charges do not in terms or by any reasonable construction provide for "plant switching" or "spotting of cars at unloading point" to be performed at plant's convenience (p. 18)."

The most important general finding of the main report was that some industries were extended preferences as compared to many others, in the form of plant spotting service performed by carriers without a charge in addition to line-haul rates, or in the payment of allowances where the industries performed the spotting service upon the theory that it was a part of the line-haul obligation. And the most important general conclusion of the main report was that the preference and prejudice in terminal spotting service resulted in waste of revenues, discriminations against shippers generally, and the payment of indirect rebates to some shippers, all of which could and should be eliminated under Commission authority to determine the point where line-haul transportation begins and ends, and what is transportation and what is plant or industry service, all as a means to determine violations of section 6 (7) of the Act. These important general findings and conclusions have been sustained and approved by this Court in many cases, as above cited, to the extent that requires legal acceptance thereof without question.

The proceedings here involved were instituted as supplemental to *Ex Parte No. 104*, the American Smelting as the Seventy-fifth and the United States Smelting as the Seventy-sixth, just as in all other such proceedings, upon the Commission's own motion (R. 70 and 575). The two cases involve similar industries and practically the same character of plant operations, methods of switching, tariff provisions, and line-haul rates. The proceedings were contemporaneously instituted, completed and decided in similar reports, with orders requiring the same kind of switching changes, and alike in practically every respect to all prior supplemental proceedings. Obviously the same principles and decisions are applicable to each case. As in other such proceedings the Commission first investigated the switching conditions at each plant involved, through its assigned agents, and thereafter formally ordered a hearing in each case. The order stated the purpose of the hearing in each instance as, "with respect to the terminal services, charges, and practices of respondents in the receipt and delivery of carload and less-than-carload freight at the plants of * * *, with a view of determining whether and to what extent there may exist violations of the Interstate Commerce Act; and of making such findings of fact and order or orders as may be appropriate under said Act" (R. 575). Hearings

were held in Denver, Colorado, that in American Smelting on May 26, 1944 (R. 873–1397, incl.), and that in United States Smelting on May 29, 1944 (Vol. 1, 578–756, incl. and Vol. 2, 757–780, incl.).

Record evidence in American Smelting relates to switching conditions at industrial plants of that company located at Garfield and Murray, Utah, and Leadville, Colorado. Testimony and exhibits were submitted by carrier witnesses and Commission investigating agents as to each plant. By stipulation of counsel maps showing the plant area, building, and system of tracks, were offered by the industries, that of the Garfield plant as Intervener's Exhibit No. 1, that of the Leadville plant as Respondent's Exhibit No. 32, Witness Moriarty, and that of the Midvale (United States Smelting) as Intervener's Exhibit No. 1, Witness O'Brien.[10]

Following submission of the examiner's proposed reports,[11] and the filing of exceptions thereto and briefs by interested parties, Division 3 of the Commission entered its reports and orders on October 1, 1945.[12] After the filing of petitions for

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[10] The above three maps are the original exhibits, which could not be included in the printed record, and photostats of which will be submitted separately.

[11] That in American Smelting on January 6, 1944 (R. 86–123, incl.); that in United States Smelting on November 22, 1944 (R. 780–791, incl.)

[12] That in American Smelting, 263 I. C. C. 719 (R. 55–85, incl.); that in United States Smelting, 263 I. C. C. 749 (R. 832–844).

reconsideration and oral argument thereon the Commission entered its reports on reconsideration and orders on October 14, 1946.[13] The second reports in each case incorporated as parts thereof the prior Division reports, in order to include the complete statement in first reports, of all material facts of record, including description of track layouts, loading and unloading points, volume of traffic, and amount and kind of services performed at each plant. These facts appear in the Division report on the American Smelter as to the Garfield plant, 263 I. C. C., pp. 720–730, inclusive (R. 55–67, incl.), and as to the Leadville plant, pp. 738–744, inclusive (R. 77–84, incl.), and in the report on United States Smelter, as to Midvale plant, 263 I. C. C., pp. 749–758, inclusive (R. 832–841, incl.).

With the exception of immaterial differences in plant lay-out, plant track mileage, terrain, and carrier performing switching service, practically the same or similar situations, conditions, methods of industry operation, and manner of car movements, exists as to each of the three plants involved. These facts are stated in the Commission hearing records by agents of the D. & R. G. and U. P. railroads, who had supervision of the switching service,

[13] That in American Smelting, 266 I. C. C. 349 (R. 29–54, incl.); and that in United States Smelting, 266 I. C. C. 476 (R. 271–279, incl.).

and is confirmed by the testimony of industry agents and Commission investigating agents."

The record evidence, without reference to tariff provisions, rates, and compensation, is of the same type and character as has been held sufficient by this Court to support such orders. In effect the Commission in these supplemental proceedings has applied approved legal principles in the manner prescribed by this Court. Court opinions appear to leave no doubt of the procedure and evidence required for Commission decisions, as to where line-haul transportation begins and ends and what is carrier transportation as contrasted with industry services, at a particular plant.

The evidence relating to the Staley plant, deemed sufficient to support that order, as summarized in *United States* v. *Wabash R. Co., supra,*

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[8] "Garfield plant was covered by testimony of Witness Moriarty, Superintendent of the Salt Lake Division of the D. & R. G. which railroad performed all switching in that plant (R. 877–908, incl.), by Mr. Daingerfield as Garfield Smelter weighmaster and yardmaster (R. 1013–1047, incl.), and by Commission Agents McCormick, Higgins, and McDonald (R. 918–944, incl.). Leadville plant was also covered by Witnesses Moriarty (R. 1081–1095, incl.), and McDonald (R. 1102–1112, incl.), and by Witness Hanebach, Superintendent of the Leadville plant (R. 1113–1132, incl.). That at Midvale was covered by testimony of Witness O'Brien, General unloading foreman for United States Smelter (R. 580–624, incl.), Witnesses Kelley and Wengert, Assistant General Yardmaster, and Terminal Train Master of U. P., which railroad performed all switching at that plant (R. 625–631, incl.), and by Witness McDonald, Commission agent (R. 631–642, incl.).

page 409, is practically the same kind of evidence as in this record shows switching conditions at each plant, and is here quoted, with deletion of "Staley," as a correct description of the switching at the three plants here involved.

> "It found that inbound cars are in the first instance placed upon interchange tracks from which they are later spotted at the points of loading and unloading, a service requiring in numerous instances two or more car movements performed by engines and crews regularly and exclusively assigned to it; that the interchange tracks are reasonably convenient points for the delivery and receipt of cars; that the movements between the interchange tracks and the points of loading and unloading are not performed at the carrier's convenience but are "coordinated with the industrial operations of the * * * Company and conform to its convenience"; that the service beyond the interchange points is in excess of that involved in switching cars to a team track or ordinary industrial siding or spur, and is consequently not a part of the transportation service which ends at the interchange tracks."

It does not appear that appellees question the physical facts relating to the three plants here involved, as placed in the record by industry, carrier, and Commission agent witnesses, in full agreement, and as stated in the Division and Commission reports. Appellees rather contend that claimed dif-

ferences in tariff provisions, rates, and compensation, differentiate these cases from prior supplemental *Ex Parte 104* orders sustained by this court. The lower court did find that the orders herein are unsupported by record evidence, which, as here believed and as will later appear, relates largely to difference in legal and fact interpretations and applications. Desiring to avoid an unnecessary burden of fact detail, and because of the closely similar switching situation at all three plants, a summary of facts, typical of all plants, and believed unquestioned by all parties, is here submitted, as taken from the Division report of October 1, 1945, relating to the Garfield plant of American Smelter (R. 56–57, incl.).

The plant is located on the side of a mountain, upon three levels, with 21.58 miles of standard gauge tracks, of which some 4.5 miles are used exclusively by plant equipment. On the upper level in south portion of plant is a plant yard, other tracks, thaw house, scale, and smelter and sampling facilities. On the middle level are various plant operations served by a number of tracks on trestles, over 2,000 feet long, which connect with U. P. tracks in west end with tracks which extend over 2,000 feet eastwardly to the B. & G. R. lead. The lowest level is on north side of middle level, where other plant operations are located, and served by tracks leading from the switch back track in western part of plant. The plant

yard on upper level contains ten parallel tracks numbered north to south 1 to 10, from 1,800 to 2,400 feet in length. Two lead tracks from the east connect D. & R. G. and B. & G. R. with plant yard, and U. P. enters plant from west over lead track connected with the plant yard. All in- and out-bound loaded and empty cars are delivered and received on the plant yard tracks by the three carriers serving the plant. By carrier arrangement D. & R. G. performs all switching in the plant with engines operating three shifts, seven days per week, one shift assigned to east end of plant yard, one to west end, and one to plant generally. The east end engine devotes 95 percent of time to weighing cars and switching copper concentrates to sampler, and the other two shifts operate generally in west end on all three plant levels.

For the twelve-month period ending March 31, 1944, a total of 22,982 carloads of a variety of shipments, a majority being Utah Copper Concentrates, were delivered to the plant by the three railroads, and 6,960 carloads shipped outbound, consisting principally of bullion. Inbound cars are held in plant yard, except Utah Concentrates, until ordered moved under industry-written instructions issued four times a day. Except for concentrates, ore shipments received in plant yard are first weighed, moved to west end of yard by gravity, then moved by west en-

gine to yard to await industry-spotting instructions, unless frozen when west engine moves cars to thaw house and, after thaw, returns to plant yard where east engine again weighs cars, and then returns to yard, as with unfrozen ores, to await spotting orders. Of 431 in-bound cars of miscellaneous materials 99 percent were switched from plant yard to scale, weighed, and upon specific orders moved to switch back leading to lower level. Loaded copper bullion cars, a preponderance of outbound interstate shipments, are switched from lower level to plant yard over excessive grades, limiting engine capacity to five cars, the distance from loading point to yard being over a mile. All out-bound loads of copper move over B. & G. R., whose tariffs provide for receipt and delivery of all freight at the plant yard, with specific charge for any movement, performed by D. & R. G. beyond that point, $2.25 per car for spotting concentrates, clay, and sand, and $3.96 for other carload interstate freight (R. 1139–1140).[18]

Prior to 1908, free switching within Garfield plant was performed by D. & R. G., without tariff in accord with the agreements made at the time of plant construction. In 1908, a tariff was filed providing for free switching (R. 1243). On

[18] The B. & G. R. (Bingham and Garfield R. Co.), serves only the Garfield plant, and no comparable switching situation or tariff exists at any other plants here involved.

February 23, 1920, by authority of the Director General of Railroads (R. 910), a tariff providing for intraplant switch charges of $2.50 per car was filed, also providing for delivery to include one movement over track scales to and from sampler to designated unloading point, with amendment November 14, 1920, to include in delivery, movements to and from thaw house and to and from sampler to unloading point (R. 1243–1244). As mutually devised by understandings of the railroads and smelters, in purported compliance with Commission findings in *Ex Parte 104*, decided May 14, 1935, a new tariff (R. 910) was filed, providing in substance that line-haul rates[16] include movement from road haul delivery point to scales and subsequent delivery to any designated plant track, which can be accomplished by one uninterrupted movement, that being interpreted by tariff "note," and that line-haul rate includes outbound move from loading points to scale and subsequently to switch line for road haul carrier. The tariff provides a $1.00 charge for other movements, and 50 cents per car for move to and from thaw house and for empty car weighing, and $2.70 for described intraplant movements (R. 1256–1257). Prior to 1920, road haul and intraplant switching was done without charge, and changes thereafter to June 1938

[16] Applies only at Garfield, Murray, and Midvale, but not at Leadville.

represent increases and decreases under Commission *Ex Parte* proceedings, that is of general application not related to plant switching obligation and performance (R. 910). Practically the same evidence was submitted as to tariff provisions at Midvale plant of U. S. Smelter, showing same rates and services as those at Garfield plant of American Smelter (R. 627-28-29).

Freight rates on ore shipments are based upon a graded scale according to valuation of metal content (R. 912). Tariffs governing such valuation rates provide for waybilling at origin on basis of approximate value, or if not ascertainable, at the rate applicable on $100.00 per ton values. Upon arrival at the consignee industry, and settlement between shipper and consignee is made on basis of return on industry assay, a revision of rates is made in accordance with "value determined and certified to carrier by such mill, smelter, or other industry," with carrier right to verify valuations by special assays (R. 1145).

At the 1944 Commission hearing Mr. Carey, the Freight Traffic Manager of D. & R. G. testified that the free switching prior to 1920 including intraplant switching, and since then specific switching, as to and from thaw house, was not in fact free, but was switching included in line-haul rates. In support of that testimony an excerpt of the testimony of Mr. Williams, General Freight Agent of D. & R. G., given at the

Salt Lake City hearing on May 19, 1932 (page B–44 of the Commission transcript), in connection with the general *Ex Parte 104* investigation, was identified by Mr. Carey. The excerpt testimony was to effect that the carrier had to get the weight, and assay certificate, and switching would be performed for sealing, moving to sampling plant, and to and from thaw house when necessary, all as included in line-haul rate, (R. 916–917). The testimony is a very minor part of the voluminous record in the general *Ex Parte 104,* which was considered, under the main report entered May 14, 1935.

The Division report in American Smelter (R. 66) held that the furnishing of values for rate purposes is the obligation only of the smelters and not of the carriers. It was found that switching at the plant must be coordinated with industry operations, that line-haul carriers could not deliver and remove cars to and from plant unloading and loading points without interference from each other, intrastate traffic, and industry operations. It was also found that the plant yard was a reasonable point for receipt and delivery of cars by the carriers, that transportation under line-haul rates begins and ends at the "plant yard," that movement beyond that point within the plant is not carrier duty, and if performed without charge in addition to line-haul rates is a violation of Section 6 (7) of the Act. Similar

findings respecting the Leadville plant (R. 79–84, incl.), were made upon the basis of the same type of evidence, fixing the "flat yard" of that plant as the point where line-haul transportation begins and ends. In the same manner the U. S. Smelter report of October 1, 1945, the Division entered similar findings upon the same type of evidence, and fixed the "assembly yard" at the Midvale plant as the point of beginning and ending of line-haul transportation."

Acting upon petitions for reconsideration of the Division orders, in both cases, and after oral arguments in each case, the Commission entered its reports on Reconsideration on October 14, 1946. The Commission reports include a careful and full consideration and analysis of these facts, and its own conclusions thereon, and in practical effect affirmed the prior Division findings. The American Smelting report includes the material parts of the tariff effective at Garfield and Midvale as of July 5, 1938 (R. 35). Another fact finding as to Garfield plant switching was that frozen traffic is handled in six distinct switching moves (R. 33). And in the U. S. Smelting report it was held significant that neither prior to or subsequent to the first published tariff provision for free switching was any change made in transportation rates (R. 277). The orders en-

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[7] *American Smelting*, 266 I. C. C. 349, that of *U. S. Smelting*, 266 I. C. C. 476.

tered with each report required carriers concerned to conform to the report findings respecting switching service at the several plants involved.

Upon complaints filed June 13, 1947, by American Smelting, et al. (R. 1), and by U. S. Smelting, et al. (R. 256), the District Court temporarily enjoined and remanded the orders of October 14, 1946, to the Commission for further consideration. Thereafter the Commission reopened the proceedings and vacated the orders of October 14, 1946, and after consideration, upon the existing record, entered its Second Reports on Reconsideration. The report in American Smelter is a full and careful analysis of established procedure and principles under *Ex Parte 104*, as has been applied in many other supplemental proceedings, and as applied in the prior reports herein. The report concludes with nine numbered findings. It is in effect adopted as a part of the report in U. S. Smelting,[18] without repeating what was said in the American Smelting report. As stated in the American Smelter report (R. 366-367), the Commission interpreted the court findings of fact and conclusions of law, in remanding the prior action, as requiring the basis of prior findings and orders to be clarified, particularly as to whether based

[18] *U. S. Smelting report*, 270 I. C. C. 385; *American Smelting*, 270 I. C. C. 359.

in whole or part upon tariff provisions, sufficiency or insufficiency of published rates, or entirely upon authority established in *Ex Parte 104*. The report states (R. 373), that no further hearing was held, as no parties requested it, and the existing record contained a complete statement and description of material facts. These reports speak for themselves, and it appears unnecessary to repeat or further summarize them at this point. In effect findings in prior orders were affirmed, and new orders, entered the same day, required carriers concerned to conform to lawful switching of plants involved as defined in the reports.

PROCEEDINGS IN THE DISTRICT COURT

Complaint in the U. S. Smelter case was filed October 6, 1948 (R. 303), that in American Smelter case was filed October 11, 1948 (R. 342). The U. S. Smelter complaint alleges twenty grounds as the basis for its prayer to enjoin and annul the Commission order (R. 311). The American Smelter complaint alleges eight grounds as the basis of its prayer to enjoin and annul the Commission order (R. 359–360). The allegations of each complaint may here be stated generally, as follows: The Commission findings are unsupported by evidence; the orders are made without requisite findings; the reports and orders do not follow or conform to the District Court order in prior cases, remanding prior orders to the Com-

mission; the orders ignore tariff provisions and evidence that line-haul rates include compensations for terminal services involved; the reports misconstrued or misinterpreted record facts respecting certain features of plant switching; the order requires carriers to depart from provisions of their published tariffs; and that the orders require carriers to charge for terminal services at these plants, provided for by tariff provisions, and compensated for in line-haul rates.

Answers generally denying allegations of each complaint were filed by the United States (R. 438 and 440), and the Commission (R. 442). At the Court hearing on October 18, 1948, all the records of the prior actions were incorporated in the respective new actions, by stipulation of parties and court approval (R. 516–521, inclusive). Without objection interventions were permitted in behalf of the States of Utah and Colorado, Public Service Commission of Utah and Public Utilities Commission of Colorado, and the Utah and Colorado Mining Associations, and petitions in support of both plaintiff industries were filed in the first court action."

Following hearing on October 18, 1948 the three-judge District Court entered Findings of Fact, Conclusions of Law, and Final Order and Decree on January 10, 1949 (R. 449–464, inclusive). Findings of fact and conclusions of law

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[19] (R. 377–383–391–396–401–408–412–416–422–426–431).

entered in the prior action were adopted and stated in full in the findings herein (R. 451–452). Proposed Findings of Fact, and Conclusions of Law were submitted by defendants and denied by the Court (R. 446–448). Circuit Judge Phillips filed a statement of concurrence with the Court findings and conclusions in the first actions, which is incorporated in the findings herein (R. 452–453).

The important Court findings and conclusions are, in effect, that carrier tariffs provide for the terminal or spotting services which they perform without a specific charge, that line-haul rates include compensation for such services, and that the Commission is required to find that line-haul rates do not include compensation for such service, as a basis for prohibiting the same on the ground that it is not a part of the line-haul obligation, and would violate Section 6 (7). The Court held that the only evidence before the Commission was that line-haul rates include compensation for the controversial services. The Court further found that the practice of carriers at these plants for some fifty years has been to deliver and receive carload freight at points of unloading and loading within the plants, and that the several plant tracks, designated by the Commission as the end of line-haul transportation and the beginning of industry operations, in other words the appropriate interchange tracks, are

nothing more than railroad yards. In short the primary basis of the lower court's findings and conclusions is, that a legal prerequisite to exercise of the Commission authority, to decide the point in time and space where line-haul transportation begins and ends, is to determine reasonableness of line-haul rates, whether sufficient in amount to cover cost of both that transportation and plant spotting, and what is or is not included in such compensation in respect to each particular industrial plant. The effect of the lower court holdings would, if sustained by this court, destroy Commission authority previously recognized, to determine upon the facts and conditions at each particular plant, what is transportation and what is plant operation, in order to compel equal delivery service to all, and root out favoritism already removed from services to many other industries, in prior proceedings supplemental to *Ex Parte 104*.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In deciding that the Commission orders are invalid and enjoining enforcement thereof.

2. In deciding, court finding 12, that no evidence before the Commission supports any of the findings upon which its orders are based, and (court conclusions 13, 14, 15, and 16) that there was no evidence to support the specific Commission findings described therein.

3. In deciding that the only record evidence before the Commission was contrary to each Commission finding, upon which its orders are based, that carrier tariffs have for years provided for delivery of freight at loading and unloading points with the plants involved, that plant tracks, designated by the Commission as the point where transportation begins and ends, are in fact railroad terminals and have for years been used as such, that line-haul rates of carriers include compensation for all switching services within the plants, incident to ore value determination, and that tariffs prior to 1938 expressly provided for all terminal switching necessary to determine value of ores, and have, since 1938, provided that line-haul rates include compensation for the service at the Garfield and Midvale plants.

4. In deciding, court finding 17, that service beyond points of interchange designated by the Commission, in connection with movements to and from unloading and loading points within the plants, do not involve any "interrupted movements."

5. In deciding, court conclusion 1, that the question as to line-haul rates including compensation for all terminal services involved, is res adjudicata, because, under finding 6, no appeal was taken from the prior court order remanding prior Commission orders for further consideration.

6. In deciding, court conclusion 3, that the Commission orders require carriers to collect and industries to pay twice for the same services, under section 1 (5) (a) of the Act.

7. In deciding, court conclusions 4 and 5, that a Commission finding upon the subject of compensation for terminal service as included in the line-haul rate, is necessary to a finding that section 6 (7) has or will be violated.

8. In deciding, court conclusion 6, that the orders here involved are contrary to principles determined in the basic *Ex Parte 104*, Part II report, as defined in court finding 18, and on such basis that industries here concerned would be required to pay terminal switching charges, from which all other industries have been exempted in all other supplemental proceedings.

9. In deciding, court conclusions 7 and 8, that line-haul rates include compensation for services here involved, including terminal switching in connection with ore value determination, and that the measure of such compensation determines the carrier obligation under line-haul rates.

10. In deciding, court conclusions 9 and 10, that the Commission orders herein do not merely require carriers to state charges separately, as to spotting services and line-haul rates, which is authorized under section 6 (1) but not under section 6 (7).

11. In deciding, court conclusion 11, that the orders herein by requiring carriers to collect

charges in addition to line-haul rates for all switching, including that involving no so-called "interrupted movements," as is here determined by the industries and railroads, would compel the carriers to disregard and depart from their published tariffs.

SUMMARY OF ARGUMENT

(a) The statutory authority

The Commission has determined what constitutes complete delivery, or where "transportation" (sec. 1 (3) (a)) begins and ends, with reference to plants here involved, by finding that the transportation services which the carrier appellees are obligated to perform under their line-haul rates, begin and end at designated interchange tracks; that service beyond such points is plant service; and that if performed by carriers without reasonably compensatory charges, would result in a preferential service not accorded shippers generally, and would constitute an unlawful refund of a portion of line-haul rates in violation of section 6 (7) of Part I of the Interstate Commerce Act. The determination of what constitutes delivery (or where transportation begins and ends) is one of fact for the Commission, to be decided upon evidence disclosing the actual conditions of operation.

This court has consistently recognized the Commissions authority to decide the limits of line-haul obligations.

The Commission is expressly charged with the administrative responsibility of applying statutory provisions to determine what is or is not a part of the line-haul obligation. Sections 1 (3) (a), 6 (7), 12 (1), and 15 (1) of Part I of the Interstate Commerce Act; see also *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

(b) Evidence of record supports the Commission orders

The evidence abundantly supports all the facts found in the supplemental reports as to "actual conditions of operation" (*United States* v. *Wabash R. Co., et al.*, 231 U. S. 402–409) at the industrial plants in question. The reports provide a precise description of the plants, the work of carriers in delivering and receiving cars upon the interchange tracks, the spotting services within the plants, the conditions under which spotting services must be performed because of the nature and requirements of the industrial operations, and the special conditions in the plants, which prevent carrier performance at the carriers' convenience. As to these findings, it appears that there is no serious claim of lack of evidentiary support. It is only contended that tariff provisions and rates include the service in question and compensation therefor, and therefore prohibit exercise of Commission authority to decide what is carrier transportation and what is industry operation at the several plants here involved.

The evidence in this case is similar in type and probative effect to that held sufficient to support the

orders in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, and *United States* v. *Wabash Railroad Company, et al.*, 321 U. S. 402. It is clearly sufficient under the language of the *Los Angeles Switching* Case, 234 U. S. 294, 311, where the rule was stated that questions of this type are "to be determined according to the actual conditions of operation."

The same finding as to "preferential service not accorded to shippers generally" was included in all *Ex Parte 104* supplemental reports, where the service was held to be beyond the line-haul obligation, including those approved by the courts. That all shippers did not receive the same terminal services, and that some were afforded a preferential service, is clearly shown by findings of fact in the main report in *Ex Parte 104* (209 I. C. C. 11, 33–43), which report in part provides the basis for all the other supplemental reports, including those in these cases. The lower court ignored the nature of proceedings here involved, as being supplemental to and a part of original proceedings in *Ex Parte 104*, and the court approved method of applying facts of that voluminous record, and legal principles established in the main report, to the particular plants here considered. This basic error led the lower court to base its decision solely upon the partial record of these supplemental proceedings, as augmented by a slight bit of testimony taken from the 1932

earing, and therefore to regard these cases as ntended to decide the reasonableness of rates and he applicability of tariff provisions. The conten- ions of appellees, sustained by the lower court, s nothing less than insistence that these are rate ases without legal kinship to *Ex Parte 104* pro- eedings.

There is ample evidence of record, including he voluminous record of the general investigation vhich was before the Commission but not before nd considered by the lower court, to support the rders herein. The holding of the lower court that he Commission findings are unsupported by evi- lence, is based upon a partial record since the oluminous general record was not before the ourt.

c) The lower court erred in substituting its judgment, for that of the Commission, in respect to administrative questions

In several material, if not vital respects, the ower court has erroneously substituted its own udgment for that of the Commission, upon ad- inistrative questions, in some instances im- aterial fact questions not decided by the ommission. Some fact questions have been de- ided contrary to the Commission, while other act decisions are based upon the relatively small ecords of these supplemental proceedings, with- ut reference to the great volume of facts de- eloped in the general investigation, except for a

very small excerpt, selected to support contentions relating to rate compensation.

These and other facts decided by the court in order to reach its judgments upon administrative questions, evidence its error and misconception of function in reviewing these Commission orders. The district court has here decided that the several "yards" described and determined by the Commission as interchange tracks, are in reality railroad yards (R. 452–453). Again the court decides that the movement of cars from interchange tracks to points of loading and unloading involve only one move other than those for which tariff charges are prescribed. The Commission found that there were as many as six moves of frozen ores to reach unloading points in the Garfield plant. On the basis of the partial record, relating solely to the plants here involved, the lower court has decided fact questions and stated its own judgment upon administrative questions based thereon. Appellees did not offer to the lower court the large Commission record compiled in the main or general proceedings, and that record was not considered by the lower court. The two records together constitute the entire record in applying general *Ex Parte 104* principles to particular plants, where questions are injected, as here, relating to custom, practices, tariff rate compensation, and what constitutes equality of delivery, under line-haul transportation compared to that accorded shippers generally.

(d) Tariff provisions and rate compensation thereunder

In practical effect the lower court found and held that established tariffs provide for the spotting services in the plants here involved, and compensation therefor in the line-haul rates specified in such tariffs. On that basis the court sustained appellee contentions that where tariffs provide for the service in question, and compensation therefor in line-haul rates, it is not a violation of section 6 (7) to perform the service without compensation in addition to those rates. A part of the court fact finding in support of its tariff and compensation conclusions, relate to custom and practices at these plants for many years, because of which the court held that yards designated as interchange points are in fact railroad yards, and that free spotting for years, as a part of delivery, must be continued in the future.

It is here urged that tariff provisions do not give immunity to preference, prejudice, and discrimination prohibited by the Act, and that carriers may not lawfully decide, by tariff provisions, where transportation begins and ends, so as to supersede the established Commission authority to render such decisions, in application of *Ex Parte 104* principles to particular industrial plants.

It is also urged that court findings and holdings, as to custom, practices, tariff provisions, compensation coverage, and transportation obli-

gations, are in error, as unsupported by record evidence as to these particular plants, are contrary to the record evidence in these supplemental proceedings, which is a partial record, since the court did not have before it or consider the voluminous record evidence in the main *Ex Parte 104* proceedings, relating to these subjects.

It is the position of the Commission as explained in the 1948 American Smelter report (R. 368–372, incl.), that questions as to what compensation is or is not included in line-haul rates, and whether such rates are sufficient in amount to cover both line-haul transportation and plant spotting, are not required to be decided in *Ex Parte 104* supplemental proceedings. Those questions were not decided in connection with the orders herein entered. Railroads may, through new tariffs, provide for separate rates and charges for line-haul transportation and plant services, on the basis of fairness and reasonableness for each. Orders herein do not prohibit such tariff adjustments, or require payment twice for the same service. Those are matters which may be determined in a different proceeding, and doubtless will be if that should be found necessary to fair and reasonable treatment.

(e) The orders here involved are not unreasonable or arbitrary

Having heretofore applied established facts and principles, as stated in the main report in *Ex*

Ex Parte 104, to many industries and individual plants, the Commission by the orders here involved has only continued to perform its duty, recognized by this court, to suppress violations found in performance of spotting services, by applying those same principles to the great smelting industry, particularly to plants involved in these supplemental proceedings.

ARGUMENT

I

THE COMMISSION ORDERS WERE AUTHORIZED BY THE INTERSTATE COMMERCE ACT

The procedure and method here adopted by the Commission to administer and enforce Congressional statutes is common to agency administration. The Commission is charged with administrative responsibility to apply statutory provisions. Here it is a problem of applying to the several smelter plants involved, the principles established in other prior court cases involving supplemental proceedings under the general investigation and main report in *Ex Parte 104*. The chief purpose of this application is to require the carriers serving these plants to render to them no more in delivery and receipt of freight than is rendered to other industrial plants throughout the country. Equality in service as between shippers, and removal of preferential service accorded a particular shipper

as compared to service rendered shippers generally, is a main objective of the Interstate Commerce Act, and was one of the important results expected from the proceedings in *Ex Parte 104*. On the basis of the tremendous volume of evidence in the record of the general investigation, and appearing in the many supplemental proceedings, it must now be an established and certain fact that many industries, usually those with the power of great traffic volume, obtain from many railroads a very great economic advantage in the form of terminal services, as compared to industries generally. In its *Ex Parte 104* proceeding the Commission fashioned the legal implements by which interstate railroad transportation could be rid of such favoritism.

In the supplemental proceedings herein the same type, kind, and amount in degree of terminal delivery service, has been ordered applied in three industrial plants of the great copper industry, as has heretofore been applied in some one hundred other similar supplemental proceedings. The extent of removal of this favoritism by voluntary action of railroads, in cases not heard by the Commission, is unknown. With the well defined principles of *Ex Parte 104* thoroughly established by court approval, and doubtless known to and understood by railroads generally, there is literally no reason why those principles should not be applied universally to all indus-

tries, rather than by legally enforced applications as here required of the Commission and Courts under this tedious process. Yet here, as in *United States* v. *Wabash R. Co., et al.*, *supra*, we find the railroads concerned continuing their abject collaboration with these powerful shippers, to the end that they may enjoy a great advantage over those less fortunate in positions of influence. They seem not to realize that the expensive favor of this terminal service extended to these shippers, is a waste of carrier revenues that must be recouped in these parlous times for railroads, from even higher rates charged the general public. If the Wierton Steel Company, Crane and Company, The Staley Company, Corn Products Company[20] have been legally and justly forced to pay for their terminal switching, beyond points

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[20] *Wierton Steel*, 209 I. C. C. 445, was a case where railroad performed free plant spotting, under similar conditions as at the plants here involved, and the Commission order to discontinue such free service was sustained in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 405; Crane & Co., was another case involving free spotting condemned by the Commission, 210 I. C. C. 210, and sustained by the District Court, without appeal, along with several other Ex Parte 104 cases in *Inland Steel Co.* v. *U. S.*, 23 F. Supp. 291, 295; *The Staley Company*, 245 I. C. C. 383, was another free spotting case, the subject of controversy in *United States* v. *Wabash R. Co., et al.*, 321 U. S. 402; and *Corn Products Co.*, 266 I. C. C. 181, is the latest free spotting case approved by this Court, and in which the facts relating to custom, practice, tariff provisions, and compensation included in line-haul rates, are almost identical with facts herein relating to the same subject.

determined by the Commission for each case, in addition to line-haul rates it would appear simple justice that the plants here involved be compelled to pay the same kind of charges for the same kind of service.

Here the Commission, conforming to standards and methods approved by this Court, particularly in *United States* v. *American Sheet & Tin Plate Co., supra,* at page 411, and in *United States* v. *Wabash R. Co., et al., supra,* at pages 407, 408, and 409, examined the record evidence relating to each of the three plants involved, and entered its findings based upon that evidence. It has found that "transportation" (Section 1 (3) (a)) begins and ends at the "plant yard" for the Garfield plant, and at the "flat yard" for the Leadville plant both operated by American Smelter, and at the "assembly yard" of the U. S. Smelter. It was found that it is the duty of the smelters to ascertain and certify value of ore shipments to determine freight charges under the valuation rates applicable to each plant, and that carriers are under no obligation to perform any switching in connection with that plant function. It was found that carriers moved loaded and empty cars between the yards, designated as the point of beginning and ending of transportation at each plant, and points within the plant areas, a service held to be in excess of that rendered shippers generally in delivery and receipt of

traffic on team tracks, or industrial spurs. It was found that services between the described interchange tracks and points served within the plants cannot be performed in a continuous movement without interruption or interference caused by industrial operations, are in excess of services performed in simple switching, and are industry services, which carriers are not obligated to perform at line-haul rates. And finally it was found that performance of such industry spotting services, without reasonably compensatory charge, in addition to line-haul rates, would be a preferential service, not accorded shippers generally, and would result in refunding of a portion of rates collected, in violation of Section 6 (7) of the Act.[21]

The lack of uniformity and unequal treatment of shippers in respect to industrial switching or plant spotting, or in payment of allowances to industries for performing their own switching, has, long before the institution of *Ex Parte 104* proceedings, been a matter of concern to many railroads, and a burdensome problem upon the Commission. The history of early efforts to eliminate this favoritism is related in the main report in *Ex Parte 104,* and includes citations to many court cases in which decisions upon different

[21] A summary of the nine numbered findings entered identically in both cases in reports of May 18, 1948, that in American Smelter is found at R. 374–375.

phases of the subject were made. In some instances, as in the *Los Angeles Switching* Case, 234 U. S. 294, railroads were imposing a charge for switching from their yards to the site of industries within the switching limits of Los Angeles. The Commission order held that charge unlawful, on the ground that the switching was a part of delivery service under line-haul obligations, and that was approved by this Court. At the same time the railroads were trying to impose a charge upon Los Angeles industry for switching which it was their duty to perform, they were performing all switching and spotting in the plants here involved, including that recognized as intraplant, without any kind of charge and for years, without reference to tariff provisions or what compensation was included in the line-haul rates.

The *Los Angeles* case is just one of many instances found by the Commission, in all the tedious years spent in trying to rid railroads of this favoritism, where a great difference in the kind of delivery or terminal switching service existed. Each supplemental proceeding under *Ex Parte 104* is a legal milestone on the long hard road toward the goal of equal terminal switching service for all shippers. The case of *New York Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y. 227, 114 N. E. 115, with the *Los Angeles Switching case*, provides ample evidence

of the extremes of terminal service which railroads were expected to accord different shippers. In the *Los Angeles* case they made a charge to move a car from the railroad yard to the plant entrance within the switching district. In the *General Electric* case that industry, within the city switch limits, received delivery at the plant interchange track, and petitioned the Commission to compel free spotting within the plant, somewhat in the manner as performed within the smelter plants here involved. After denial of that petition the New York action was filed, seeking a court order to compel free plant spotting. In denying that complaint the court, perhaps for the first time, clearly marked the line between railroad transportation obligation, and the industrial service involved in movement of cars within plants. The court there said, pages 117–118:

> The decisive question must therefore be whether the switching done by the defendant within its plant between the storage tracks and the platforms of its mills is work that the plaintiff was bound to do as a part of transportation. To put it in another form, the question is, Where does transportation begin and end? The published tariffs to Schenectady establish switching limits extending from Sandbank to Carmen and Stony Lane. Delivery within those limits is paid for when rates are collected to Schenectady. Since the

> limits embrace the defendant's plant, there is no dispute that delivery at the plant is covered by the rate. The difficult thing is to ascertain when delivery at the plant is made.
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> Industrial spurs, within the switching limits designated by the carrier, are to be regarded, indeed, for many purposes, as an extension of the terminals. *Los Angeles Switching* case, 234 U. S. 294, 34 Supp. Ct. 814, 58 L. Ed. 1319. But reasonable delivery does not involve the carrier's cooperation in the division of labor and of functions between the sections of a gigantic plant. This network of tracks is and must be under unified control. Order and method must reign. * * * The engines that move within this plant are not doing work that the plaintiff ought to do, or effectively could do. They are doing the defendant's work. They are "plant facilities."

Later decisions of this Court clearly recognize Commission authority to remove preference and prejudice resulting from lack of uniformity in terminal services rendered at different plants and in different sections of the country. We need only refer to *United States* v. *American Sheet & Tin Plate Co., supra,* and *United States* v. *Wabash R. Co., et al., supra,* to remove all questions as to this Commission authority. In the *Tin Plate* case, page 408, the Court held, "The Commission is clearly empowered to de-

termine what is embraced within the service of transportation and what lies outside that service." In the *Wabash* case, it is stated, page 408, "This Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

The orders herein are merely an exercise of that Court-established authority, in the manner defined and approved by the Court, and fully supported by the kind of record evidence as is held sufficient, and do not hold that plant service for which there is a tariff charge would violate Section 6 (7). They only hold that service within the plants beyond the points of interchange, are industrial operations, and if performed free would violate section 6 (7). In fact, these orders condemn only the performance of services within these plants, beyond the designated points of interchange, for which there is no charge, in addition to the line-haul rates. The lower court has here regarded the tariffs as sacred contracts which cannot be disturbed, even to the extent of interpretation of terms to suit the necessity of the moment, and as constituting an insurmountable obstacle to court-recognized Commission authority to decide where transportation begins and ends. In *Merchants Ware-*

house Co., et al. v. United States, 283 U. S. 501, 510–511, this Court sustained a Commission order which forbade carrier performance of certain carload transportation for warehouses, under established tariffs, on the ground that such service would nullify published rates. The Commission has here acted upon the court-stated principle that immunity is not given to discrimination and preferences, merely because extended in tariff form.

It is here believed that the Commission authority to apply principles established under *Ex Parte 104* to particular industrial plant has been so long established, recognized, and applied as to leave no room for further controversy, even in the babel of confusion created in these proceedings, relating to custom, practice, tariff, and rates at the plants here involved.

II

RECORD EVIDENCE SUPPORTS THE COMMISSION ORDERS

The lower court held as a fact (R. 449–459, incl.), that no evidence before the Commission supports the orders of May 18, 1948. It is doubted that appellees or the lower court have or could question facts relating to switching conditions. They appear to contend herein that these cases have no relation to the general proceedings, investigation, voluminous record evidence, and main report in *Ex Parte 104*, and that the only proceeding and evidence here pertinent and material is that contained

solely in these supplemental records. This clearly reveals the fatal error of the Court below in basing its consideration and decision upon a partial record. Evidencing this error are contentions of appellees sustained by the Court, that these smelter plants have been given free spotting service since beginning operations, that railroads have for a part of this time provided in tariffs for the spotting service free, that current tariffs define the terminal service considered as a part of the line-haul obligation, and that line-haul rates were always intended to include compensation for the plant switching performed. These subjects will be later discussed in more detail. It is sufficient to state at this point that the lower court has fallen into a serious misconception, in respect to custom and practice of carriers, which it has decided relates only to the plants here involved.

That appears to be the only reasonable basis for court findings of fact in that respect, particularly with reference to findings 12 to 17, inclusive (R. 455–457, incl.). Otherwise the findings would completely disagree with the holding of this Court in *United States* v. *American Sheet & Tin Plate Co., supra,* page 410, where in referring to such custom and practice, it was held, "The record fails to establish any such custom." Obviously, the Commission consideration in its main report in *Ex Parte 104,* relating to custom and practice of carriers, tariff provisions, and compensation under

line-haul rates, relates to the record evidence on those subjects, procured in the general investigation, of hundreds of plants throughout the country, and not just that which may apply to a single plant or industry. Equally obvious is that the Court reference is to the general situation not to a particular industry. This is supported and emphasized by the interpretation and opinion of the district court in Corn Products Refining Co., page 872, a decision affirmed by this Court, where it held, in reference to custom and practice, that the Commission should not be compelled "to relitigate the basic issues in each supplemental proceeding." To sustain the lower court decree herein, on that basis, would effectively destroy Commission authority to "determine what is embraced within the service of transportation," and repudiate the prior fact established by this Court that there is no such custom.

What the lower court really holds herein is that the railroads concerned, prior to these Commission supplemental proceedings, gradually amended the tariff provisions for switching these plants, eliminating the more obvious free plant services, and finally to define in the tariffs what is embraced in railroad transportation and what is embraced in plant service, and on that basis decides that the railroads, rather than the Commission, as held by all prior court decisions, have full authority to determine these questions. In

this way the lower court has, for its own purposes, transformed these cases from Supplemental *Ex Parte 104* proceedings, to rate cases under other provisions of the Act, not pertinent to exercise of the Commission authority herein, as recognized by this Court. The Commission has not here decided tariff and rate issues, insisted as necessary by the lower court, but confines its determination to the single question of what is embraced in the railroad transportation at each of the plants involved. The effect of that is to require a reasonably compensatory charge for all services performed by the railroads "beyond the point in time and space at which the carrier's transportation service ends."

The orders herein do not require payment twice for the same service, and the Commission has not here decided that tariff charges for plant spotting are or are not sufficient or reasonable. It has only been decided that such switching is not a part of line-haul transportation, and if performed without a reasonable charge in addition to the line-haul rate, would be a violation of Section 6 (7). Under contrary fact findings the lower court concluded (R. 459–463, incl.), that the carriers are obligated to perform the plant switching according to tariff provisions, as interpreted by railroad and industry officials, and directly in conflict with the Commission decision as to where transportation begins and ends. The court also concluded

that to require these industries to pay for services rendered within the plants, beyond the interchange tracks designated by these Commission orders, would require a second payment for the same service, since all the record evidence shows that compensation for the services is included in the line-haul rates. In short the lower court completely ignores all of *Ex Parte 104* proceedings, except that presented by these supplemental proceedings, and an erroneous interpretation of selected portions of the Commission's main report. This constitutes as complete and effective decision contrary to prior decisions of this court in other *Ex Parte 104* supplemental cases, as if the lower court had distinctly and directly stated its disagreement with this court.

The photostats of plant maps submitted separately with this brief, show the complicated and extensive network of plant tracks and buildings. The maze and extent of plant tracks, including the easily observed interchange plant yards designated by the Commission and identified on the map photostats by a red I imposed thereon, indicate the great distance of car movements between points within the plant. And the large traffic moved in the plant, with the complications of plant operations, show the obvious necessity for coordinated plant switching to meet the needs of industry. Obviously, all physical parts of these plants, including plant tracks, were designed to

contribute to the best industry operation, without reference to railroad convenience in performing the line-haul transportation used in that operation.

The Garfield plant is on a mountain side built on three levels, with more than twenty miles of plant tracks, over which the D. & R. G. switches the plant with standby engines operating three shifts each day seven days per week. Industry engines operate over some of the same tracks used by D. & R. G. The U. P., D. & R. G., and presumably the Bingham & Garfield now operating exclusively intrastate, deliver and receive all freight on tracks of the plant yard, consisting of ten tracks from 1,800 to 2,400 feet in length. Line-haul engines deliver to and receive all freight on the plant track, and D. & R. G. plant engines, operating for all carriers, moves all freight from plant track to the various plant facilities, and all loaded and empty cars to the plant track. D. & R. G. provides the engines, crew, and pays the cost of spotting performed, under the direction and written instructions of plant officials. One engine operates in east side of plant and devotes 95 percent of its time to weighing; another operates in west side and another operates throughout the plant for general switching. Some 25 hundred cars of a variety of commodities, largely concentrates and ores in-bound and bullion out-bound, pass in and out of the

plant each month, with all cars moving to and from the plant yard and moved by carrier engines. All cars come to rest upon the plant yard tracks, being moved if in-bound, as industry directs, by the D. & R. G. plant engine, to scales, thaw house, sampler, and points of unloading, sometimes involving as many as six movements, with ore cars being weighed a number of times loaded and empty, before and after moving through thaw house. Out-bound cars are moved from loading points over switch backs with excessive grades, sometimes with four or five cars at a time because engines can move no more, and after moving to plant yard thence to scales for weighing, are returned to yard where the line-haul engines pick up for that transportation.

Mr. Moriarty, D. & R. G. Superintendent, in describing the Garfield switching within the plant, referred to some car movements from plant yard to west entrance switch on lower level, that distance not stated but from map appears to be several thousand feet, and from the west entrance switch thence east some 4,000 feet to unloading point (R. 890). This witness also described frozen ore movement, a condition usually experienced from October to April, as cars being left on plant yard by line-haul engines, with first move from plant yard to scale, thence to thaw house, and after thawing to scale, and finally to unloading points, admitted by this witness as four move-

ments (R. 891). As construed by the Commission, this consists of six movements, after cars are cut off in the plant yard and prior to placement for unloading, (1) to scale, (2) to thaw house, (3) to plant yard, (4) to scale, (5) to plant yard, and (6) to unloading point. (R. 33.) Even the six movements described in the Commission report appears to be a modest estimate of such movements. As stated by Mr. Moriarty, cars are moved under direction of the plant with orders being accepted by the D. & R. G. yardmaster (R. 895), who, "as nearly as possible, carries out the wishes of the smelter in placing these cars and the time which he places them" (R. 899). Description of movements of ore was given by Mr. Daingerfield, Garfield plant yard and weighmaster, American Smelter official (R. 1019–1020). The D. & R. G. engine couples to cars on either 3, 4, or 5 track in plant yard, pulls cars to east over switch that connects with scale house, then pushes cars to scale where each car is weighed, uncoupled and will drift down to No. 2 line almost to end of track, where the west end engine places them back on the plant yard, awaiting orders from the smelter. Upon this description and by reference to map distances, it appears that frozen ore cars move first east to scale switch, thence to scale, two moves each of some 2,000 yards, and after weighing, which requires an engine stop and push for each car, the cars drift down to west

end track, some several thousand feet, to be there picked up by west engine and returned to plant yard, another movement of several thousand feet, awaiting smelter orders to thaw house, another switch move of several thousand feet. Then after several days thawing, cars are again picked up and returned to plant yard, another movement, then switched as in first instance in two moves to scale, and finally to drift by gravity to unloading points. This appears to be at least six distinct switch moves, not counting the engine stop and push for each car at scale, necessary in weighing, and obviously required by industry operation. Certainly such complex, long distance switching with multiple car movement, as is here necessary in this plant operation, cannot be a part of railroad line-haul obligation, or even remotely resemble delivery service at carrier convenience. It is correct that a part of these moves come under the charge provided in carrier tariffs, as the 50 cent per car charge for movement to thaw house, then after thaw to scales for weighing and thence to unloading points. Apparently no other charge is made for these ore movements, except 50 cents for empties as required by the smelter, all other of these multiple movements, being regarded as uninterrupted movements (R. 12).

To illustrate the similarity of switching at each of these three plants, reference is made to the division report in U. S. Smelter, where switching

conditions are described at the Midvale plant, upon the record evidence in that case (R. 330–341, incl.). The plant is located in mountainous terrain, has 48 standard gauge tracks totaling 14 miles, serving 16 plant loading and unloading points. The plant is served by U. P. and D. & R. G. with plant switching performed by the carriers under joint provisions of two engines with four crews. U. P. owns and maintains five tracks, each 600 to 1,000 feet long, located at the northeast corner of plant, and used as an interchange where line-haul engines receive and deliver freight. The D. & R. G. crosses the plant east to west, and operates two parallel tracks about 800 and 1,100 feet long, used for receipt and delivery of freight by line-haul engines. Eleven parallel plant tracks, 400 to 1,500 feet long, called the "assembly yard," are used by both railroads for general switching, passing and storage. The general practice is to switch all cars to the "assembly yard." Movements of cars to and from various points in the plant are under direction of plant officials. Final point of ore delivery depends upon and awaits the plant assay, and is unknown until after sampling. Cars of ores are usually moved to the "assembly yard," held there pending plant instructions, then moved to scale for weighing, thence either to combined concentrator and sampler in south yard or the sampler in north yard, unloaded at

the sampler and after sampling reloaded in other cars, then switched to storage tracks in the "assembly yard" to await further plant orders. All of Lark ore cannot be spotted when received as engines are unable to switch more than 8 cars at a time, up the steep grade to the trestle (R. 336). The report recites a number of delays noted by Commission agents in their 5-day investigation (R. 334). In practical effect the same tariff and rates apply to Midvale as at Garfield.

To show by other typical evidence the switching conditions at these plants, excerpts from the testimony of Mr. McDonald, the Commission agent and supervisor of the 4-day investigation made in March 1944 are set forth as follows (R. 631–642, incl.): Witness is experienced in railroad operations and participated in the investigation of the Midvale plant. Excessive grades of over three percent exist in track approach to trestles in flotation mill, smelter mill, and of two and a half or three percent on track to bullion house in the bullion hole. In some cases loaded cars from flotation mill, when moved to scale and weighed, were found insufficiently loaded, returned to mill for added load and moved a second time to scale for reweighing (R. 633–634). Witness did not consider all unloading tracks of plant of sufficient capacity to accomodate all loaded cars at one time, and at the flotation mill

and north trestle, even if the track capacity were sufficient, two movements would be required to place all these cars, because of the heavy grades. Written reports of four other Commission investigators were submitted in evidence by Mr. McDonald, showing check of movements in this plant for the four days observed, by car numbers (R. 672–754, incl.). To illustrate, the plant switching of a typical car movement, as shown in these reports, was described by witness McDonald as follows (R. 638–639): A car of ore, 21915, arrived at plant over U. P., on March 27, 1944; on March 29, at 8:15 a. m., it was taken from the U. P. delivery yard by engine No. 2, to scales and weighed; on same day at 8:45 a. m., the same engine moved car from scales to belt track of new flotation mill; at 10:05 a. m., the same engine moved car from the belt track to trestle into mill; at 12:05 p. m., the same car, empty, was moved by the same engine from the high line to scales, weighed light; and at 1:35 p. m., the car was moved from scale to U. P. interchange track, with one 50-cent charge for move of empty car to scale for weighing.

The same type of evidence was submitted to show switching conditions at the Leadville plant of American Smelter, and is stated in detail in the Division report (R. 108–116, incl.). Further record reference to this type of evidence seems unnecessary since these facts cannot be

questioned. All this mass of physical facts showing switching conditions was ignored or disregarded by the lower court.

There is a difference in the tariff provision at Leadville, where the 1920 tariff applies. For some unexplained reason the 1938 tariff applicable at Garfield and Midvale was not applied to Leadville. The 1920 tariff still in effect at Leadville (R. 11) provides that delivery will include movement over track scales, to and from thaw house, to and from sampler, to designated unloading point indicated by the Company. This tariff does not provide that the delivery and other service rendered is compensated for out-of-line-haul rates, as is done or attempted in the 1938 tariff. The 1920 tariff frankly decides for itself where line-haul transportation begins, on a basis that could only be dictated by industry interest, without mention or conception of interruptions, which are recognized and require a charge, in addition to the line-haul rate, under the 1938 tariff. Leadville pays nothing under its tariff for movement to and from the thaw house, for additional interrupted movements, or for empty weighing movements, for which Garfield, Murray, and Midvale are compelled to pay, fifty cents, one dollar, and fifty cents, respectively. About the most obvious difference in conditions at these plants is that Leadville is given free service for which Garfield and Midvale must pay, even though that pay is,

on its face, quite insignificant. The frankness of the 1920 tariff is in the fact that it makes no pretense of compensation in line-haul rates, for this free switching, as does the 1938 tariff.

The lower court, in order to provide a basis for its holding that the Commission findings are without evidence support, and that all the record evidence before the Commission is contrary to its findings, has failed completely to note the evidence of physical facts and switching conditions existing at these plants, as above noted, or has disregarded the same. It is difficult to believe that the lower court is unfamiliar with prior opinions of this court, to the effect that the type and kind of evidence above related is precisely and only that required for Commission decision as to the point where transportation begins and ends.

Findings of fact by the lower court are not explained by opinion, except by the statement of the Honorable Circuit Judge, member of the Court, made at the conclusion of the first court action, and incorporated as part of the findings herein (R. 452–453). The adoption of that statement may indicate the real basis of the final decision of the lower court. Nowhere in any statement of the court is mention made or note taken of the location and terrain of plant sites, the size of plant and number of points to be served, the number and extent of plant tracks,

the volume and kind of traffic passing in and out, how that traffic is handled by standby engines and crews furnished by the railroads, the amount of coordination necessary to industry operation or sacrifice of carrier convenience to that operation, the provision and use of interchange tracks, of the manner and detail of car movements in, through, and out of these plants. These are the items upon which the Commission based its decisions, and which the lower court failed to note or ignored in reaching its decision.

Court findings 13, 14, and 15 (R. 456), find that the only evidence before the Commission is that for more than fifty years the railroads have never delivered or received freight at the several yards designated by the Commission as convenient points for such receipt and delivery at each plant, that such designated tracks are not industrial tracks, as the Commission held, but instead are railroad terminal facilities used as any railroad yard, and that line-haul rates include compensation for all terminal switching beyond such designated points, including so-called "interrupted movements" incident to determination of ore values. Court conclusion 3 (R. 460) is to the effect that the Commission orders, requiring payment for the switching concerned in addition to line-haul rates, would result in payment twice for the same switching service. These findings and conclusions appear sufficient

for the effort here made, to ascertain, if possible, the basis or specific record evidence used by the court to support its findings. The statement of the Honorable Circuit Judge, above cited, may account for the findings and conclusions of the entire court, upon which the final decree herein is based. The Honorable Circuit Judge stated that he would find that the yards designated by the Commission as points for receipt and delivery of freight, are "actually used by the railroads as terminal facilities," that line-haul transportation includes one uninterrupted switch placement or customary and reasonable terminal service not in excess of simple switching or team track delivery, that the only record evidence supports the conclusion that tariffs include compensation for switching beyond points designated by the Commission as the beginning and end of transportation, that there is no record evidence to overcome the presumption they are not performing services gratuitously, and that the Commission orders would require two charges for the same services. In practical effect these findings, which the Honorable Circuit Judge stated he would adopt, are adopted in the final findings and conclusions of all three members of the court below. The problem of the moment is to locate evidence, if possible, used as support for these court findings, which in reality constitute very obvious substitution of court judgment for that

of the Commission, upon administrative questions.

There is a modicum of record evidence stating the opinion of industry and friendly railroad witnesses, that the yards designated by the Commission as industrial yards and convenient points for receipt and delivery of freight, are "receiving yards" for railroad use, or "railroad terminals." Under close questioning by industry counsel (R. 898), Mr. Moriarty, division superintendent of the D. & R. G., agreed that the plant yard at Garfield was used as such railroad yard or terminal. The lower court failed to note, or merely ignored the earlier testimony of this witness (R. 883–884), that all three railroads serving that plant *delivered* their freight *at the plant yard,* that *all movements are controlled by switch orders issued by the smelter,* and (R. 895), that the *railroad yard or engine master receives all instructions from the plant.* The same witness (R. 902), further stated that the plant yard operated as any railroad terminal, suggested as a proper answer by the questioning, and followed immediately with a reference to plant service as "industrial switching" and added (R. 903), *"Regardless of its name under the tariff it is still industrial switching after we get hold of it."* [Italics supplied.] Mr. Moriarty has quite frankly and sincerely stated the conception of the railroad men, who handled the switching at these plants, and clearly indicates that they considered the spotting an industry service, not a

railroad obligation, regardless of the obvious effort to give it a different appearance. It is evident that the Commission decision, based upon all the evidence of physical facts and switching conditions, agrees with the opinion of railroad workers who actually perform the switching. Equally evident is that the lower court did not agree with this conception of railroad workers, but chose to accept the views expressed in tariffs, intended to extend all the free service possible to these favored industries.

The record of the Midvale and Leadville plants contain little or no direct opinion that the designated yards there are railroad yards. The Leadville superintendent, an industry employee, did refer to the flat yard as a railroad yard used for railroad convenience (R. 1119). That is the expressed opinion of an official of American Smelter at that plant, not the opinion of railroad workers who actually performed the service. It is hardly possible that any industry or high railroad officials, here obviously trying to please these industries, would concede that any part of the switching at these plants is other than railroad convenience, or that any movement is "interrupted," or that the delivery service is in excess of that involved in simple switching or team track delivery.

It is practically impossible to conceive the findings and conclusions of the lower court as being based upon the physical facts and switching conditions at these plants, as shown by these supplemental rec-

ords. The court findings follow in practically the same sequence, express the same conceptions, and use almost the same language as that of the American Smelter complaint. The court has failed to state or indicate any specific record evidence support for its findings and conclusions. There is nothing to indicate that the court has considered all or any part of the facts of record. It appears to have relied upon opinion of witnesses or complaint allegations, and on that basis to have evaluated the weight and probative value of the evidence. By that process the court arrived at a conclusion completely different from that of the Commission.

It seems certain that no other conclusion is possible than that facts related in the Commission reports involved are taken from the records in these supplemental proceedings, relate to the physical operations of the industry plants concerned, and is distinctly the evidence required for Commission decision as to what is industry service in contrast to railroad transportation, and as to where that transportation begins and ends in respect to a particular plant. Prior decisions of this court in similar suppiemental *Ex Parte 104* proceedings, and in other similar cases, leave no doubt of this legal fact. It seems legally certain that findings and conclusions of the lower court, that the orders involved are unsupported by record evidence and, that all record evidence is contrary thereto, is wholly unwarranted.

III

THE DISTRICT COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION UPON ADMINISTRATIVE QUESTIONS

The discussion above concerning the facts of these cases, constituting evidence support for the Commission orders, appears to fully justify the assumption that the lower court ignored the record facts, completely accepted appellee complaint allegations as a correct statement and interpretation of fact and law, and on that basis proceeded to decide such fact questions, as it deemed desirable, and to substitute its judgment upon administrative questions involved, for that of the Commission. It also appears that the lower court was not concerned over, or has disregarded the very definite limits to court review of such Commission orders, as has been thoroughly established by this Court. Those limits are so well known to courts generally that they are usually considered elemental. This is plainly the principle stated in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139–140, as follows:

> Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Com-*

merce Commission v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541.

In *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353, substitution of the court judgment for that of the Commission upon a question of preference and prejudice was condemned on the ground, as said by the court, that the lower court had "obviously exerted an authority not conferred upon it by statute." In that connection the court further said:[22]

> It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. * * * And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination.

Upon the assumption, here deemed fully justified, that the lower court has actually decided the

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[22] *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534; *Interstate Commerce Commission* v. *Hoboken Manufacturers Railroad Co.*, 320 U. S. 368; *United States* v. *Wabash R. Co., et al.*, 321 U. S. 403, 408.

act question presented, in order to provide upport necessary for its findings, the error is patent under many prior opinions of this court, nd is plainly an invasion of the exclusive func- ion of the Commission. There can now be no loubt that in a review of Commission orders the ourts have no legal authority to decide fact uestions. That was plainly stated in *Virginian Ry.* v. *United States,* 272 U. S. 658, 663:

> There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co.* v. *United States,* 271 U. S. 268. No irregularity in the proceedings before the Commission is even suggested.

And to dispose of all questions relating to ourt authority to decide facts and substitute its dgment upon administrative questions, refer- nce is made to the language in *United States* v.

Pierce Auto Lines, 327 U. S. 515, 535–536, where it was said:

> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that "* * * the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission had done. Unless in some specific respect there has been prejudicial departure from requirements of the law, or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

Here the Commission decided under all the facts of these supplemental records relating to the plants involved, and the switching conditions there prevailing, and the great volume of facts contained in the general investigation record considered first in the main report in the *Ex Parte 104*

proceeding, relating to hundreds of plants all over the country and to switching conditions existing therein, that according to established standards, spotting or terminal services at the plants here involved, is not a part of the railroad transportation obligation, is in fact a part of the industry operation, that such switching when considered as a part of receipt and delivery of freight is in excess of that required in simple switching or team track delivery, and that performance thereof by railroads without a compensatory charge in addition to the line-haul rates, would result in a preferential service not accorded shippers generally, and constitute a violation of section 6 (7).

In contrast the court has here, as based upon a partial record, consisting only of the records in these supplemental proceedings, the record of hundreds of plants contained in the general *Ex Parte 104* proceedings not having been submitted to or considered by the lower court, decided that spotting or terminal services at the plants here involved is a part of the railroad obligation, is not in fact a part of industry operations, is a part of receipt and delivery service at the plants, is not in excess of that required in simple switching or team track delivery, is the duty of railroads to perform as a part of their line-haul obligation without charge in addition to the line-haul rate which provides compensation therefor, and that such service without additional charge is not a

preference compared to service rendered shippers generally.

These court fact decisions and judgments upon administrative questions are first stated by the court as lack of evidence support for Commission findings. There immediately follows a second court finding that, "On the contrary, the only evidence before the Commission," supported the court fact decisions and judgments. Clearly the lower court disregarded the voluminous general record in *Ex Parte 104*, which was not before the court but was before the Commission, or considered it immaterial or not related to these supplemental proceedings. Where the court finds that all the evidence shows, for instance, that the designated plant tracks are railroad yards used for railroad purposes, and not interchange tracks used for industrial purposes, there is no question of review of the Commission finding, but rather contrary court fact finding and statement of its judgment. The court finding that the only record before the Commission was that of these supplemental proceedings, appears to hold that the large general record in *Ex Parte 104*, which was not before the court, also was not before the Commission. This is an erroneous assumption contrary to fact, and well known to this court. The general record was before this court in *United States v. American Sheet & Tin Plate Co., supra*, and the opinion therein and in other supplemental

proceedings since have held that all supplemental proceedings are a part of that general record.

On the basis of its fact decisions and exercise of judgment upon administrative questions, the decree of the lower court should be reversed.

IV

TARIFF PROVISIONS AND COMPENSATION INCLUDED IN RATES THEREUNDER DO NOT PRECLUDE COMMISSION DECISION AS TO WHAT IS OR IS NOT A PART OF THE RAILROAD TRANSPORTATION

So many supplemental orders similar to those here involved have been sustained by the courts, that it was necessary for appellees to interpret from the records herein some different legal basis for their complaints. In all prior cases courts have sustained these orders as a valid exercise of Commission authority. That would indicate legal compulsion to apply the same principles and standards of evidence to these supplemental orders, to determine their validity.[22]

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[22] A total of 38 such supplemental orders have been sustained by the courts, 22 by this court, and 17 by district courts without appeal; six orders in *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U. S. 402; nine orders in *United States* v. *Pan American Petroleum Co., et al.*, 304 U. S. 156; single orders in *Goodman Lumber Co.* v. *United States* and *A. O. Smith Corp.* v. *U. S.*, both reported in 301 U. S. 669, affirmed without opinion; two orders upon limited review in *Inland Steel Co.* v. *United States*, and *Chicago Ry. Products Coke Co.*, 306 U. S. 153; one order *United States* v. *Wabash R. Co.*, 321 U. S. 402; one order *Hanna Furnace Corp.* v. *United States*, 323 U. S. 667, affirmed per curiam; one order *Corn Products Refining Co.* v. *United States*, 331

Appellees here contend that the tariff provisions for services, and the rate compensation thereunder, are different from those in prior supplemental proceedings, and prohibit application of *Ex Parte 104* principles as applied in the prior cases. Particular differences claimed are that rates on ore shipments, the principal inbound traffic, are based upon valuation of the metal content, that tariffs provide for the plant switching or spotting and that rates thereunder include compensation for the services rendered, both for line-haul delivery and for specific plant switching as set up in the tariffs. This contention is that rendition of the plant spotting services conforms to tariff provisions, is paid for by rates thereunder, and that the railroads have already determined what is and is not a part of their transportation obligation, where that obligation begins and ends, and just what these plants should receive in delivery and spotting service. In short it is claimed that the railroads have already decided

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U. S. 790, affirmed per curiam; and of the seventeen orders sustained by district courts only those deemed of any importance are here cited as follows: *Elgin, Joliet & Eastern Ry. Co.* v. *United States*, and *East Chicago Dock Terminal Co.* v. *United States*, 18 F. Supp. 19; and *Inland Steel Co., et al.* v. *United States*, 23 F. Supp. 291, where six orders were sustained, two upon limited appeal to this court, and with particular reference here to one of the other four, the 34th Supplemental Report in Crane & Company. *Kingan & Co.* v. *United States*, decided April 28, 1944, unreported, in which the court dismissed the complaint for want of equity.

what and how *Ex Parte 104* principles shall be applied to the switching of these plants. Having expressed these railroad decisions in tariff form, at least satisfactory to railroad and industry ideals, both claim that the Commission orders herein threaten, as they interpret the proceedings, to disturb their tariff contracts.

The lower court, in full agreement with contentions of appellees, held, in its conclusions of law, that the line-haul rates include compensation for, and that tariffs provide for the services as rendered, that spotting service within these plants and beyond the tracks, designated by the Commission as the end of railroad transportation, constitutes carrier obligation under tariff and rates, and that the Commission orders would require the industries to pay twice for the same service. This court conclusion is based entirely upon the finding that line-haul rates include compensation for all plant switching services, for which no additional charge is made under tariffs. The compensation finding is based solely upon the record of these supplemental proceedings, and takes no account of the voluminous record relating to hundreds of plants investigated in the main *Ex Parte 104* proceedings. This holding alone shows the court conception that these cases could be decided only as separate from and unrelated to the main *Ex Parte 104* proceeding. Because of this misconception the lower court has erroneously based

its decisions upon the partial record, as to questions of compensation, custom, practices, and tariff control of plant spotting.

The only evidence considered related solely to the plants involved in these supplemental proceedings. Nothing relating to these subjects, as found to exist at hundreds of other plants throughout the country, which is in the general record not before the lower court herein, was considered as having any bearing upon the kind and amount of spotting service rendered to shippers generally. Facts and principles established by prior court decisions were not applied or deemed relevant to the issues herein. By no other process of reasoning can conclusion of law 8 (R. 462), be accounted for. By that conclusion the court decided, as a fact, that service to these industries does not result in a "preferential service not accorded shippers generally," as the Commission decided. The Commission decision in that respect rests upon the evidence of the general record, and the records in these supplemental proceedings. The court decision rests solely upon the record in these supplemental proceedings, only a part of the record considered by the Commission. How could the lower court here decide what service other industries generally received, where no record evidence on that subject was before it? Without evidence relating to other industries, such as is contained in the general

record not before the lower court, how could the lower court know anything about custom, practice, tariff, compensation, or spotting service at other industries? Practically the same contentions were made in *Corn Products Refining Co.* v. *United States, supra,* respecting custom, practice, tariff, compensation, and switching conditions, upon the same kind of evidence. The district court in that case sustained the Commission order in that supplemental proceeding, under procedure, evidence, and manner of switching similar to that herein. Affirmance of the Corn Products decree by this court points to the error of the lower court herein, in respect to its findings and conclusion upon these questions. Nevertheless it appears that the questions, particularly tariffs and compensation, should here be further clarified.

The differences claimed by appellees and sustained by the lower court appear to relate to the variable valuation rate applicable to ore shipments, the provisions of existing tariffs, and the service for which line-haul rates compensate the railroads. The lower court has frankly based its decisions respecting custom and practice in spotting service to that existing at these particular plants. The lower court appears to hold that the custom and practice at these plants must continue, even though that may continue a favoritism of long standing.

No logical or legal reason is stated by appellees or in the lower court findings and conclusions, to support the contention that line-haul delivery, under a valuation rate, should be greater to an industry chiefly concerned with mineral bearing ores, than the other industries dealing only in shipments under normal rates. Testimony of Mr. Carey, Freight Traffic Manager of the D. & R. G., in relating the history of these rates, provides an explanation for the contention that a delivery service, different from that accorded shippers generally, should be afforded smelters in receiving ore shipments (R. 914). After explaining the switching necessary in establishing ore values, and offering his opinion that free service under line-haul rates should be restored with Commission approval, he added that difficulties in ore delivery could only be changed by abandoning the valuation rate, and that would result in the closing of marginal mines. This appears to be another way of saying that railroad operation should be such as to protect some unidentified interests in continued operation of marginal mines. Production of minerals needed in the war and peace economy of this country is most desirable; but certainly that cannot be a proper railroad function where that requires a type of service not accorded shippers generally. Under the Interstate Commerce Act no industry or shipper may legally be given a preference.

The Commission approved this valuation rate upon the insistence of the mining and smeltering interests, as designed to meet the needs of that industry.[24] Except for general increases applicable to practically all rates, no increase or decrease in this valuation rate has been made to meet the changing cost under changing tariffs. Another reason, stated in the record, for continuing the valuation rate and determination of freight charges, is the testimony of the General Traffic Manager of American Smelter (R. 950), that the assay process enables the private industry to conceal (from supposedly competitive interests) details of value and weights, which might otherwise be revealed in public tariffs. Protection of its legitimate trade secrets is not objectional, unless that involves a railroad service not a part of the transportation obligation, as here. In approving this method of rate making, no question of what terminal service was included in the rate compensation, or what spotting service for determining the rate was to be performed by carriers, was presented to or considered by the Commission. There appears to be no factual, logical or legal reason for a different application of *Ex Parte 104* principles under a valuation rate than under any other type of rate.

[24] Non-Ferrous Metals, 204 I. C. C. 319.

The second difference contended by appellees and sustained by the lower court, is that of tariff provisions. It is not here understood how the lower court could decide this question, where the only evidence considered in the partial record before it related to the plants here involved. Certainly the court had no record information upon the tariffs applying to the hundreds of plants generally considered in the main report, and particularly those applicable to the American Sheet & Tin Plate Company and the other five industries sustained in that decision, to Corn Products Refining Company and to Elgin, Joliet and Eastern R. R. Co., as were considered and sustained in those supplemental proceedings. So far as appears within the information available to the lower court, the tariffs in other cases above referred to, may present quite similar provisions as those here involved.

The above statement may not be fully applicable to the tariff provisions and questions of compensation involved in Anaconda Cooper Mining Company, the seventy-seventh supplemental proceedings, considered practically as a companion case with those of American and U. S. Smelters, and first decided under a Division report entered the same day, October 1, 1945.[*] The *Anaconda case* involved the same valuation rate, the same tariff provisions, the same processes for ore value de-

[*] 264 I. C. C. 103.

termining, including switching, and the same kind of contention and evidence relating to compensation under line-haul rates. The dissenting opinion of Commissioner Alldredge in the *Anaconda case*[*] (R. 52–54, incl.), was based upon the tariff provisions, valuation rates, and compensation included in line-haul rates, which was referred to in the complaint of American Smelter herein, as being based upon evidence that line-haul rates include compensation for terminal switching services, beyond the points designated by the majority report. Commissioner Alldredge also dissented to the report in American Smelter (R. 51–52), with the explanation that his dissenting expression in the *Anaconda* case, decided concurrently, "apply with equal force to the situation at Garfield, Murray, and Leadville plants here considered." The Commissioner dissented in the *U. S. Smelter* case (R. 280–283, incl.), on practically the same grounds. Although the lower court did not have the record details in the *Anaconda* case, it did have knowledge of the sameness of valuation rate, tariff provisions, and compensation in line-haul rates, with those here involved. Action by Anaconda in the District of Montana, seeking to enjoin and annul the Commission order in that proceeding, on practically the same grounds as those involved in these actions in the District of Utah, was dis-

[*] 266 I. C. C. 394–396, inclusive.

missed (77 F. Supp. 611–612). The Commission order sustained by that court, was described in the per curiam opinion, as follows:

> * * * the Great Northern and the Milwaukee Railroads serving plaintiff's plant at Black Eagle, Montana, were ordered to cease and desist from switching within said plant of loaded and empty cars for weighing and the further movement of cars such as from the thaw house to the sampling track or from the sampling track to points of unloading or other points within the plant, beyond the named and described interchange or hold tracks, which was held not to be a part of the transportation service under the line-haul rates and required additional charges to be made therefor.

The Anaconda Company apparently accepted that court decision entered December 19, 1947, as no appeal was taken therefrom. For some two years Anaconda has been paying terminal charges for services which the lower court herein held must be rendered to these appellees without charge. It appears certain that the District Court of Utah erred in its decision herein, or that the District Court of Montana erred in sustaining legality of the Anaconda order. All courts that have heretofore decided *Ex Parte 104* supplemental orders, except district courts reversed upon appeals, appear to completely agree with the Montana Court Anaconda decision.

The lower court finding 14 (R. 456), is that nder *expressed provisions of duly published tar-ffs* railroads have for some fifty years delivered nd received freight at actual points of loading nd unloading within these smelter plants. Had he court omitted the statement "under the ex-ress provisions of their duly published tariffs," would be difficult to disagree with the finding, ince doubtless these railroads have performed ll the service now in question, and at one time ven intraplant switching without any charge. listory of these tariff provisions refute the court nding that for more than fifty years under *xpress tariff provisions* carriers have performed his switching.

The General Traffic Manager of American melter testified as to tariffs covering plant witching, since the first was published in 1908. his testimony was based upon company records nd obviously not a matter of personal knowledge f witness who was employed in 1942 (R. 944). he first tariff was effective April 16, 1908 R. 946). Company records offered as exhibits o testimony of the General Traffic Manager R. 1243), show switching within the Garfield lant from 1905 to 1908 was performed free by he D. & R. G., in accordance with agreement eached at time the plant was built. The 1908 ariff provided for switching all cars of freight ithin the plant, "*which has paid transportation*

*charges to the plant * * * free.*" [Italics supplied.] The 1908 tariff was unchanged until February 25, 1920, when, *for the first time,* a charge of *$2.50 per car for intraplant switching* was made, along with the provision for delivery at all these plants to include one movement within a smelter plant, over track scales, to and from sampler, to an unloading point designated by the smelter. In November 1920, the intraplant charge was increased on all freight except coal and ore to $3.00 per car, and the delivery at plants was amended to include "movement" (not "one movement"), "to and from thaw house," to and from sampler to designated unloading point (R. 1244–1245). Effective in December 1923, a new tariff was published again increasing the intraplant switch charge, defining "Inter-Terminal," "Intra-Terminal," and "Intra-Plant" switching, the last as "A switch movement from one track to another within the same plant or industry" (R. 1247). This tariff provided rates for Bingham and Garfield R. R. *transportation to the Garfield plant yard,* and a charge of $2.25 per car for switch of concentrates from plant yard to unloading point, including "movement within Smelter plant yards over track scales to and from the thaw house, and to and from the Smelter sampler" (R. 1823). By its tariff effective September 10, 1931, the D. & R. G., provided that "all carload rates * * * covering traffic on which it receives a line or road

ıl, include the switching service to and from
side tracks, warehouse tracks, or industry
ıcks within the switching limits of the D. & R.
W. R. R." (R. 1251). In the same tariff pro-
ion was made at Garfield for delivery to in-
ıde movement over track scales, to and from
aw house, to and from sampler, to designated
loading point (R. 1252). Effective July 5,
38, the tariff was published which has, in prac-
al effect, remained in force to present, and
ıich is the particular tariff here concerned.
R. 1256–1257).

As shown by exhibits to testimony of the freight
affic manager of the D. & R. G., the tariff
fective December 22, 1915, provided for switch-
g from track to track within smelter plants
rved by D. & R. G., of cars of freight upon
ıich transportation charges have been paid,
Free." [Italics supplied.] (R. 1141.) Another
hibit to testimony of this witness shows pres-
t tariff provisions for the Leadville plant,
actically the same as the 1920 tariff at all
ants (R. 1151). Just why the 1938 tariff
ıendments, which attempted to apply, by inter-
etation extremely favorable to industry, the
r Parte 104 principles to the smelter industry,
ıs not also applied to the Leadville plant, re-
ıains unexplained. Perhaps this is just another
idence of favoritism extended this particular
ant, as for instance furnishing and maintaining

free plant tracks (R. 1128), which were not furnished to U. S. Smelter at Midvale, or even to other American Smelter plants at Garfield and Murray.

Another confusion and error of the lower court respecting tariffs, is found in its finding 16 (R. 456), to the effect that for some 30 years prior to 1938 carrier tariffs provided that *the specific terminal switching movements necessary to determine ore values were included in line-haul rates,* and that the present Leadville tariff continues that provision. That goes back to 1908. As appears from above cited record evidence, there was no tariff provision applicable to any plant switching until 1908 when that was provided for *"free."* Before that all switching was performed, including intraplant, without charge and without bother of tariff. The 1915 tariff provided for plant switching of all cars in which line-haul transportation was paid, again for *"free."* And the February 1920 tariff, still in force at Leadville, provided that delivery would include "one movement of a commodity" over track scales, to and from sampler, to unloading point. When found deficient in "free" service to industry, that tariff was amended in November 1920, to add "to and from thaw house" as a part of delivery. Prior to the 1938 tariffs none provided or mentioned "specific terminal switching," necessary to determine ore value, as found by the

art. The switching done first, free without riff, next free under tariff, and then specific part of delivery, never referred to switching determine ore value, although a part of the ee movements were connected with that process. pparently the tariff provision for valuation tes always provided for determination by elter assay with certification of value to rail-ads, upon which the charges were figured. ese tariffs clearly made it the function of elters, as the Commission held (R. 1153).

For the first time the July 5, 1938 tariffs pro-ded, under specific language, that the line-haul te included movement of loaded cars to track ales with subsequent movement to designated ant tracks, which can be accomplished by "one interrupted movement * * * *from the ad-haul point of delivery to the switching line."* talics supplied.] The "uninterrupted move-ent" is described as "one continuous movement switching locomotive and crew without inter-ption resulting from orders from or require-ents of, the smelter." The tariff further ovides a charge of "$1.00 per car for additional specified movements, $2.70 per car for intra-ant movements, and 50 cents per car for empty rs to scales for weighing, and for frozen cars and from thaw house, and after thawing, to ack scales for weighing thence to designated int for unloading (R. 1273).

The testimony of rail and industry officials provides this evidence of tariff provisions, covering the more than forty years up to present time. The tariff provisions in their own terms, not only do not support the court findings 14 and 16, but actually refute those findings. Actually the tariffs did not make the same provisions for all four plants involved, as at Leadville where the 1920 tariff still applies, and different railroads had different charges at the same plant, as at Garfield where U. P. and D. & R. G., for long years did everything in the plant free, and the Bingham & Garfield R. R., made deliveries and received cars upon tracks of the plant yard, and made a charge of $2.25 per car or more, for movements to and from points within the plant, under the tariff of 1924 (R. 1250). Apparently one B. & G. R. movement within the plant, for which the tariff charge is made, is described by counsel for American Smelter and approved by D. & R. G. division superintendent (906), as pushing cars from east over the scale, and when cut off just drifting down to unloading point. As shown above the B. & G. R. receives and delivers all freight at the plant yard, under tariff provision, and that freight is spotted by the D. & R. G. within the plant, at a charge of $2.25 and $3.96 per car. Also all out-bound bullion cars are routed over B. & G. R., apparently incurring a charge from loading points to plant yard, and

redelivered by B. & G. R. to the U. P. and D. & R. G., a few miles out of the plant, with the long distance interstate haul completed by or through U. P. and D. & R. G. Since the B. & G. R. has discontinued its interstate service, it is assumed that copper bullion is now delivered to U. P. and D. & R. G. at the plant yard, without the switch charge formerly made under prior tariffs, and without dividing line-haul charges with the B. & G. R.

The reason for abandonment of interstate service by B. & G. R., does not appear in this record. The Commission order will doubtless not concern future intrastate operations of that railroad. Its past operations are material here only as that may serve to explain, understand, and account for the strange changes, complexities, and maneuvering of railroad tariffs, obviously seeking to render as much spotting service free, as long as was possible, to these plants of the great copper industries. It is very strange that the Bingham & Garfield R. was given a great advantage over the other two railroads serving the Garfield plant. While D. & R. G., and U. P., were spotting their own freight for no charge or for a relatively small charge, D. & R. G., was being paid for a much less difficult spotting service of B. & G. R. freight, practically in the form of an allowance.

Although B. & G. R., operated wholly within Utah and did not itself reach interstate points, all

copper shipments out-bound interstate were billed through B. & G. R., for transport some few miles, to be redelivered to D. & R. G. and U. P., both of which railroads could have received that freight directly from the industry at the plant yard. Apparently B. & G. R. shared in this interstate transportation upon some kind of joint rate agreement, only because of some unrevealed industry preference. It would be interesting to know the economic kinship represented in the word "Garfield" appearing both in the railroad and the American Smelter plant. It is revealing that all these facts point to continuous effort on the part of U. P. and D. & R. G. to give as much free spotting to these plants as long as they could do so, while B. & G. R. participated in the bulk of in- and out-bound shipments, on the basis of interchange and delivery service, that the larger railroads never dared to apply.

Perhaps the strangest part of the B. & G. R. operations at Garfield is the fact that carload freight was delivered and received by that railroad upon the plant yard, designated by the Commission to be the point of receipt and delivery for the D. & R. G. and U. P. Very clearly the former practices, customs, tariffs, and service of B. & G. R. conform completely to the orders herein respecting future service of D. & R. G. and U. P. It seems obvious that where appellees and the lower court mention custom, practice, tariffs, and compensation, no consideration was given to the utterly contrary custom,

practice, tariffs, and compensation, as evidenced in operations of B. & G. R. The record shows that B. & G. R. has conformed to *Ex Parte 104* principles without compulsion, while U. P. and D. & R. G. have at the same time sought, through devious tariff provisions to evade and delay conformance to those principles. Surely, if it were proper and agreeable for the B. & G. R. to receive and deliver freight at the Garfield plant yard, necessitating a charge for plant spotting in addition to its line-haul rate, it will not now be improper or illegal to compel U. P. and D. & R. G. to perform the same service, in the same manner, and for the same kind of charge.

The lower court finding 15 and conclusions 3, 5, 6, 7, and 8, to the effect that compensation for services involved is included in line-haul rates, is not only immaterial and unnecessary to the proceedings here involved, and based upon consideration of a partial record which does not include all the general investigation record, but also is not supported in substantial degree and warranted by the record in these supplemental proceedings, considered alone. The Commission held in its Second Report on Reconsideration, entered May 18, 1948, that questions of applicability of tariffs and reasonableness of published rates and charges for performing industrial services, do not require consideration and decision in *Ex Parte 104* proceedings. The Commis-

sion interpreted the remand of the court in the prior action as requiring clarification of the basis of orders involved. The court had found (1) that the 1946 order was based upon the premise that line-haul rates did not include the plant services in controversy, (2) that on such basis the order was void because no evidence supported it, (3) that all evidence was contrary thereto, (4) that the Commission may, under Supreme Court decisions, assume authority to decide where transportation begins, and (5) that the Commission had not specifically based the orders upon its *Ex Parte 104* authority (R. 367–368). The court remanded the orders to the Commission "for such action as it may find justifiable in the premises" (R. 302). On the basis of these court findings, conclusions, and order, the Commission understood that the court desired a definite statement of the basis for its orders, particularly as to whether based upon *Ex Parte 104* principles, or upon the question of compensation for services involved.

The Commission interpreted the remand as clear indication that the court would sustain validity of the orders, if based solely upon *Ex Parte 104* authority, and would hold them invalid if based solely upon the question of compensation. In that situation it was believed less of a burden upon the courts to reconsider and restate the basis upon which the orders had in fact been

issued. It is believed that the plain language of the court findings, conclusions, and order of remand, support interpretation made by the Commission and demanded the action taken. The report of May 18, 1948, was a most sincere effort to conform to the court requirements, and to restate the basis of these orders under *Ex Parte 104* authority, entered with absolute confidence that the court would approve. This accounts for the careful explanation in the report as to compensation questions not requiring decision and the definite statement that only *Ex Parte 104* principles were relied upon as basis for the orders. The report itself is a full exposition of what is and is not necessary to application of *Ex Parte 104* principles to the plants here involved, with references to ample court authority to support conclusions stated.

As noted in the report on reconsideration (R. 373), counsel for the industry (American Smelter), in oral argument to the Commission has perhaps stated the crux, if not the single question of consequence here involved, in stating the contention that "tariffs superseded our authority to declare where transportation ends, urging that it would not be violative of section 6 (7) of the Act to perform the services at the rates and charges set forth in the tariffs." The above stated history of curious tariff manipulations lead inevitably to the conclusion that prior to 1908, the free plant

switching was performed without reference to tariffs and compensation therefor, either under line-haul rates or otherwise. Private arrangement between industries and carriers for that free service, much of which has since been recognized by both parties as being no part of carrier transportation, must now be plainly recognized as a rebate. The private rebate was changed into a tariff-recognized rebate under the 1908 and 1915 tariffs. This continued until the 1920 tariff, still in force at Leadville, where for the first time a charge was made for what both parties agreed was intraplant switching. That tariff undertook to define what spotting was to be performed as part of the delivery service. The 1920 tariff definitely decided the point in time and space at which the transportation service began and ended, and did not bother to add that compensation for the delivery service was included in the line-haul rates charged. This tariff was changed in 1938, obviously as an effort agreed upon by industries and carriers, to forestall Commission decision upon the vital question as to what is plant or industry service and what is carrier transportation. If more were needed the statement of counsel for American Smelter, above quoted, is convincing that the 1938 tariffs were not an effort to conform these carrier operations to *Ex Parte 104* principles, but rather a device which would or might prohibit the Commission from later applying

those principles upon a basis less favorable to the industry. The system used by these carrier and industry tariff arrangements have been slow to give up favoritism first born some 50 years before when rebates were a common practice.

To provide some semblance of fact support for this free service it was necessary to claim that compensation therefor is and was always included in the line-haul rates. The evidence to support that idea is extremely meager, and as a basis for the court findings, is taken from a partial record. The only part of the general investigation record, submitted to the court below, was that part relating to American Smelter as developed at the Salt Lake City hearing on May 19, 1932 (R. 535–573, incl.). The 1931–1932 hearings, as this court has noted in several cases, was a part of the general investigation of hundreds of plants throughout the country, never intended to do more than to provide the basis for general findings and conclusions which were entered in the main report, and no order was entered under that report, because particular plants were to be later considered in supplemental proceedings. That procedure has been followed in every subsequent consideration given to a particular plant, including those here involved. Some forty pages of the printed record here contains the portion of the general investigation record which was submitted to the court below, and this relates to switching at the Gar-

field Smelter and to the plant of the Columbia Steel Co., also served by the D. & R. G. and U. P. railroads.

Several witnesses testified as to the Garfield switching. Reference is here made only to such parts of the evidence as is deemed pertinent. The Assistant General Manager of D. & R. G. stated that his railroad exclusively assigned switch engines only at the American Smelter plant (R. 548). He stated that the railroad considered movement of cars for determining ore value, a common carrier duty (R. 560). After describing the comparatively simple switch of B. & G. R. concentrates, he said the D. & R. G. collected $2.25 per car for spotting from the Smelter (R. 561). This is a service obviously the same in type as that performed by D. & R. G. without charge, for all other freight. He further stated that the tariff provided what the railroad determined to be a part of road haul common carrier delivery, which explained why that duty was not fully met by delivery at the plant yard (R. 559). He stated that he did not know of any instance where two or more carriers make the same terminal charges or arrangements, "that a single carrier makes when it gets a line-haul" (R. 561). And finally he stated that their line-haul rates were made to include "this terminal service," which he had just described (R. 563).

This witness unintentionally clarifies some of the confusion as to why tariffs were changed over

the years. Apparently it was to meet increasing threat to cancel rebates. He makes it clear that railroads customarily rendered different kinds of terminal services, as here free spotting of D. & R. G. and U. P. freight, and a charge of $2.25 per car for practically the same spotting of B. & G. R. freight. He claimed frankly that it was the railroad duty to switch cars in the process for determining ore value, although as later discovered in this record, the tariff itself made that process plainly the duty of the smelter. He explained that where tariffs provided for specific switching it was a duty to perform it. That means, of course, that a favoritism that could not lawfully be extended in the absence of a tariff provision, is made lawful when included in the tariff. And finally, in securing justification for these brash interpretations, he stated that line-haul rates were made to include compensation for the services. It is beyond belief that line-haul rates could intend inclusion for the service to ascertain ore value, which the tariff itself plainly provides is the duty of the smelter, not the railroad. As if to emphasize this the freight traffic manager in 1944 testified that, in connection with application of *Ex Parte 104* principles, he thought free service should be reinstated "for that portion of those services that are necessary for the railroad to have the information required to assess their freight charges." Those charges must be

certified by the smelter after its assay and settlement with shippers, and the railroad is not permitted to know details of the industry secret assay. This appears to be a clear admission that switching in connection with the assay is prohibited by *Ex Parte 104*, in the understanding of the railroad. The 1938 tariff recognized that part of the switching to determine ore values is plant service, not railroad transportation, and makes a small charge therefor. If a part of that switching deserves a charge, in addition to line-haul rates, it seems that all should be paid for in the same way. That is what the Commission has here required. This witness offered the excerpt from the 1932 general investigation and added his opinion that some of the tariffs, referring to free switching, was switching included in the line-haul rates (R. 916).

A strange part of the 1932 general investigation offered herein to the lower court, by the American Smelter, is the part (R. 565–573, incl.), relating to the custom and practices at the plant of Columbia Steel Company, also served by D. & R. G. and U. P. The evidence is that at this steel and iron plant, with some 10 miles of plant tracks and switching inbound some 25 cars per day of various commodities, the railroads receive and deliver all freight upon interchange tracks of the carriers, outside the plant, and that all plant switching to and from those

interchanges is done by the plant engines, without allowance from or free spotting by the railroads. This evidence affords a vivid contrast between the terminal services extended to the Smelter plants here involved and the Columbia Steel Plant, which was just one more of the hundreds heard and considered as the basis for findings in the Commission's main report.

Except for general *Ex Parte* increases the valuation rates here concerned were not changed in all these years (R. 910). When it is realized that these rates were determined and published more than forty years ago, it must be understood that no railroad or industry official who took part in planning and preparing those rates is now available to state that any service, in addition to line-haul, was intended to be compensated for thereby. The private arrangement for free plant switching prior to 1908, the frank tariff provision for "free" service thereafter to 1920, and with the first tariff statement of compensation being included appearing in 1938, more than thirty years after first adoption, is convincing that line-haul rates did not intend compensation for anything more than the line-haul transportation. Witnesses in these late years may only express an opinion on the subject, justifiably influenced by the fact that they have performed the service for years. The frank testimony of rail officials that carrier judgment expressed in tariffs deter-

mines what is and is not line-haul transportation, indicates railroad thinking without reference to legal principles, of which they are uninformed. Counsel for American Smelter carries out this railroad thinking in his contention that tariff provision supersede and prohibit Commission authority to decide where transportation begins and ends. Even though it is unnecessary here to decide reasonableness of rates, as the Commission explains in its last report, the meager evidence of this record upon the subject does not warrant the findings and conclusions of the lower court, that line-haul rates include compensation for the services in question.

This court has long recognized that unlawful preference, prejudice, and discrimination is not made lawful simply because it is committed under a published tariff. In *Merchant Warehouse Co., et al.*, v. *United States*, 283 U. S. 501, railroad tariffs purported to make a number of Philadelphia warehouses a part of station facilities of the carriers, and provided allowances to the warehouses for loading and unloading package freight. The Pennsylvania Railroad provided for such allowances in its published tariffs, and others received allowance under contract with carriers. Other competing warehouses received no allowances, and they complained to the Commission, seeking to annul the terminal service arrangements, on the ground of discrimination and

preference, and that the allowances were unlawful rebates. The Commission found the practice to be discriminatory and unlawful, and ordered the carriers to cease and desist from paying the allowances.[27] This court stated, page 509, that an important question related to the services for which allowances were paid, as to whether that was transportation, for which carriers may discriminate by payments to some warehouses and not to others. It was noted, as of vital importance upon questions of discrimination and rebate, that the favored warehouses were permitted to assemble, distribute, and reship package freight, of less than carloads, into carload lots and ship at carload rates. This was labeled, page 510, as a service which carriers are not authorized to render, even at their public stations, and "if performed would nullify its published rates for carload transportation." On this basis it was held, page 511, that the allowances were forbidden, as departures from published tariff rates on carload traffic, and amounted to rebates.[28] It was further held that carriers might lawfully perform or pay for some of the services at warehouses, but may not "extend the privilege to some and withhold it from others," since "Section 2 forbids the carrier to discriminate by way of al-

[27] 160 I. C. C. 563.

[28] Citing *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444, 446; *United States* v. *Union Stock Yard Co.*, 226 U. S. 286, 307.

lowances for transportation services given to one, *in connection with the delivery of freight at his place of business,* which it denies to another in like situation."* [Italics supplied.] The opinion noted, page 512–513:

> The evil of discrimination was the principal thing aimed at by the Act, see *Louisville & Nashville R. Co.* v. *United States, supra,* p. 749, and its language is certainly broad enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn. *Shreveport Case,* 234 U. S. 342, 356. Section 3 makes it unlawful for any rail carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever. * * *"

In sustaining the Commission order the opinion, as if foreseeing the situation here involved, held, page 511, that:

> Where a forbidden discrimination is made, the mere fact that it has been long continued and that the machinery for making it is in tariff form, cannot clothe it with immunity. See *Louisville & Nashville R. Co.* v. *Interstate Commerce Commission,* 282 U. S. 740.

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* Citing *Union Pacific R. Co.* v. *Updike Grain Co.,* 222 U. S. 215, 220.

Again this court, in *Baltimore & Ohio Railroad Company* v. *United States*, 305 U. S. 506, squarely condemned a warehouse storage in transit service, at the Port of New York, then rendered under tariff provisions, under the guise of transportation. The Commission instituted proceedings, upon its own motion, concerning practices of railroads in the warehouse and storage of property in the Port of New York. The proceeding was under *Ex Parte 104*, Practices of Carriers Affecting Operating Revenues or Expenses, Part IV, Warehousing and Storage of Property by Carriers at Port of New York, similar to but not the same as Supplemental Proceedings, Part II, Terminal Services.[30] The railroads there undertook to provide free storage and other services for shipments in transit, under published tariffs. The Commission held, page 201, that a part of such services were not transportation under the Act, and that, pages 198–199:

> When carriers by their tariffs extend their service beyond their legal obligation as common carriers, as, for example, beyond a delivery equivalent to team-track delivery, we have ordinarily found that such extra service must be paid for by the shipper in order to avoid preference and prejudice. *General Electric Co.* v. *N. Y. C. & H. R. R.*, 14 I. C. C. 237; *Pressed Steel Car Co.* v. *Director General*, 93 I. C. C. 224,

[30] The Commission report is in 198 I. C. C. 134.

109 I. C. C. 75; *Carnegie Steel Co.* v. *Director General,* 96 I. C. C. 527, 132 I. C. C. 689.

The Commission report further said, p. 200, "these practices lead also to violations of section 6 (7) of the Interstate Commerce Act," and ordered carriers to correct the practices. In the court action, opinion 525–526, the railroads insisted, just as here, that the service was under tariff provisions, and even if in-transit warehousing was not technically transportation, that would protect it from the charge that it violates section 6. The opinion then followed with a quotation from the Commission report, as follows:

> What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services which are not within their common-carrier obligations and, by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. The tariffs now on file are instruments which work violations of the act in that, through them, respondents hold themselves out to perform commercial services (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3, and 6 of the act.

Following this quotation the opinion said, page 526:

> We accept this conclusion. If the service is nontransportation, the fact that it is in a tariff does not save it from the condemnation of section 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the order valid in these circumstances.

A case which appears to be, in all respects, directly in point, with the issues here presented, is that of the *Elgin, J. & E. Ry. Co., et al.* v. *United States,* 18 F. Supp. 19. This case was heard and decided before a statutory three-judge court and sustained the Commission order involved. The facts of that case involved terminal services by the carriers for the East Chicago Dock Terminal Company. The Elgin, J. & E. Ry. Co. operated a belt line railroad around the City of Chicago. Under its published tariffs it provided for, as included in the delivery service of line-haul traffic, the placement of cars where shippers

and consignees desired them to be placed for loading or unloading. In certain cases where consignees desired to place their own cars, the Elgin Railway agreed thereto and published tariffs providing for payment to the consignee for performing such spotting service. That was the relationship between the railway and the dock company. The Commission order therein was entered in another of the supplemental proceedings under *Ex Parte 104*, and was the application of the principles established in that main report to this particular railroad service. There, as here, the Commission found that the line-haul obligation was completed and ended when the line-haul freight was delivered at designated interchange tracks, that the service performed by the carrier beyond those points was plant service, and that payment of an allowance for such service performed by the consignee was a violation of section 6 (7) of the Act. In that case there was no question but that the performance of the service involved by the carrier, or in lieu thereof, the payment of an allowance to the consignee when it performed that service, was completely and strictly a conformance with the provisions of the tariff. The tariff involved in that case, with respect to performing the spotting terminal service, appears to be practically the same as here involved in the 1920 tariff, applicable at present only at the Leadville plant, which simply states that a part of the de-

livery will be the spotting and movement of cars within the plant. Courts have so often held or indicated that there is no difference in the principles involved between the spotting service performed by carriers ostensibly as a part of their line-haul obligation, and, in lieu thereof, the performance of such service by industry motive power, with an allowance therefor paid to the industry by the carrier, that it is here taken as a subject foreclosed from further consideration. To further emphasize the situation, the Commission order in that case was based clearly upon the finding that the service beyond the designated interchange tracks was a plant service, not an obligation of the carrier under the line-haul obligation, and that the compensation to the carriers under the line-haul rates began and ended at such designated tracks, all as constituting a violation of section 6 (7) of the Act. The statutory court sustained that order despite the tariffs involved and no appeal was taken therefrom. Other cases, above cited, clearly indicate that this court ruling was in complete accord with principles that have already been enunciated by this Court, and that such an appeal would have been a futility.

The court opinion in the *Elgin Ry. Co.* case first notes, p. 21, that whether a published tariff rate is unjust, unreasonable, or discriminatory, is a matter which the Interstate Commerce Commission, by law has been empowered to determine under the

existing facts and conditions. It next notes, p. 22, the authority for the publication of tariffs by carriers, and the provisions under section 15 (1), 49 U. S. C. A. 15 (1), that in setting aside or canceling such tariffs, the Commission must first reach the conclusion that a rate or practice is unjust or unreasonable or unjustly discriminatory, or unduly prejudicial or preferential, or otherwise in violation of the prvisions of the Act. In passing it is to be noted that plaintiffs' contentions herein appear to be directed to an effort to force the Commission to consider the tariffs involved under the provisions of section 15 (1). That very question was considered and overruled by the court in the above opinion, where it was said, p. 22, "It is first contended by plaintiffs that the Commission's authority to make the order, which they deny, must be found, if at all, in section 15 (1) of the Act." The court further said, in this same connection, that "Under this section, it is obvious that, before the Commission can act, it must first reach the conclusion that a rate or practice of the carrier is or will be unjust or unreasonable, * * * or otherwise in violation of any of the provisions of the act." This is followed on the same page of the opinion with the following court statement of principle:

> Plaintiffs' argument assumes with certainty that the so-called spotting services involved in these controversies constituted transportation within the meaning of the act; that the railroads were lawfully bound

to perform those services under their contractual obligations of the published tariffs; and that the tariff rates must be considered as just and reasonable compensation for such services, and undiscriminatory until the Commission find to the contrary.

With this contention we are unable to agree. * * *

That court opinion further stated, concerning the Commission authority with reference to the principles established in *Ex Parte 104,* at p. 24:

> While no exact formula can be applied, yet certain principles can be followed which will be both helpful and equitable as applied to all cases. We think it was within the province of the Commission under the act to promulgate and enforce the principles which they announced, as hereinbefore referred to. They seem to us to be fair, and are sufficiently flexible in their application to cover all cases, and are calculated to approximate the rights and duties of the parties involved as nearly as it is humanly possible.

And this is followed by the further statement of the court on the same page, as follows:

> It is true that the Commission made no finding or conclusion that the allowances for what it termed "plant services" constituted unreasonable compensation for

fully find to the contrary. And major question 3 is:

> "3. Whether the Commission may treat as wholly inoperative and not binding upon the railroads or the appellant a tariff schedule which by its terms is applicable at appellant's plant and defines the circumstances under which charges in addition to the line-haul rates will be made in connection with the switching of cars, which schedule has not been ordered cancelled or held to be unreasonable or discriminatory or otherwise in violation of the Act."

There is no question that the facts concerning tariffs and compensation, as stated in the Corn Products brief and above referred to, were uncontradicted and was the only evidence in that record upon the subject. The argument there is unmistakably the same, on the questions of tariff and compensation, as herein argued by appellees and adopted by the lower court in its findings and conclusions. Major question 3 of that brief, above quoted, could not more clearly state the legal basis of the lower court decision herein. It appears beyond question that the decision, conclusions of law, and final decree of the lower court, upon questions of tariff and compensation, are in clear and distinct conflict with prior decisions and opinions of this court.

V

THE COMMISSION ORDER IS NOT ARBITRARY

Under facts and law above stated it seems certain that the Commission has here only applied principles established in the *Ex Parte 104* proceedings, in the manner approved by decisions of this court, and which have previously been applied to many other industries. That cannot be arbitrary. The Commission has given the most careful consideration to every claim and contention made by these industries, in opposition to the proceedings and orders herein. Even when the lower court in the first action remanded the orders for further clarification of the basis of the Commission decision, with apparent recognition of the legal authority to so order if based upon *Ex Parte 104* principles, the proceedings were reopened, reconsidered, and new reports containing nine specific findings were entered. The Commission interpreted, as here believed fully justified, that the lower court, in its remand findings, indicated its inability to determine the precise basis for the orders, expressed the view that the orders would be lawful if based upon a holding other than that the railroads were not compensated for the services, and practically invited the explanations and findings which were incorporated in the 1948 reports.

Actually the Commission, in entering the report, believed that it was precisely what was de-

> such services. It was unnecessary to do so because it found that all such services were unlawful. Hence they were inherently unreasonable and unjust by reason of their unlawfulness. For the same reason, it was unnecessary for the Commission to specifically find that the rates were discriminatory.

And as here, the Commission made no finding that the service involved, as provided for under tariffs, constituted unreasonable compensation for such services, *since it was found that such services were unlawful.* That is precisely the point we are here attempting to make, viz, that the Commission having found that the transportation obligation under line-haul rates begins and ends at the designated tracks, the performance of that service beyond such designated tracks, is not a part of the line-haul obligation of the carriers, and for that reason the tariff provisions to the contrary are unlawful, and it is not necessary, in prohibiting that service as a violation of section 6 (7), that the Commission first find that the tariff is unreasonable or otherwise a violation of the Act or what compensation is or is not included under the line-haul rates.

The allegation of errors in the Commission order, in appellee American Smelter's first complaint, and practically adopted in toto by the lower court findings of fact and conclusions of

law, relate almost entirely to the contention that railroad tariffs provide for the questioned services, and line-haul rates compensate therefor, and therefore the Commission cannot here compel the carriers to stop performing all or part of the service. In short appellees contend, and the lower court agrees, that railroad tariffs are sacred contracts and services therein provided for must be performed at the rates and charges prescribed, although, as stated in paragraph XXII (5) of said complaint (R. 21), "such charges be 'nominal,' 'unreasonably low,' or 'less than the full cost of service for those services,' and although thereby violation of other sections of the Act might be involved." This is quite an understandable claim, which the lower court approved, that tariffs may require service which is not a part of transportation, and which may constitute a discrimination or preference, without danger of being declared unlawful, except possibly under sections of the Act other than 6 (7). It also is the plain contention that railroads alone, and not the Commission, have authority to interpret and apply such tariff provisions, to decide what is and is not transportation, and what shall or shall not be included in the delivery service under the tariffs. If that sort of power were recognized as belonging to railroads, and as having been taken from the Commission, as is practically held by the court below, the Interstate Commerce Act may be disregarded,

and railroads could return to the old days of rebates, where, as here before 1908, intraplant and every kind of service could be given industries, under private arrangement without bother of tariff or interference of the Commission.

Claims of appellees and holdings of the court below herein, are strangely alike and reminiscent of those same complainings, urged in brief of counsel for appellees, in the *American Sheet & Tin Plate Case, supra.* The similarity is so great as to warrant quotation from that brief, as follows:

> In every one of these cases (as appears from the Bills of Complaint, answers filed and admissions read into the record (R. 516)), tariffs covering the allowances now condemned were regularly published by the carriers and filed with the Commission. Hence the payment of the allowances was *not in violation of paragraph (7) of Section 6, but in accordance therewith.* A violation would have resulted had the Railroads *failed* to pay the allowances as provided in their published tariffs.
>
> The Commission and the Courts have uniformly held that the published tariffs of the Railroads are absolutely controlling in the matter of rates applied and charges exacted of shippers for all transportation services: *A. J. Poor Grain Co.* v. *C., B. & Q. Ry. Company,* 12 I. C. C. 418, 422 (1907); *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Company,* 204 U. S.

426, 51 L. ed. 553 (1907); *Davis* v. *Portland Seed Company*, 264 U. S. 403, 425, 68 L. ed. 762, 769 (1924); *Beaumont, Sour Lake & Western Ry. Co.* v. *Magnolia Provision Company*, 26 Fed. (2d) 72 (1928). In the case last cited the Fifth Circuit Court of Appeals said (p. 73):

"* * * The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915 A. 315."

It inevitably results that for a carrier to comply with its published tariff which "is to be treated as though it were a statute" cannot possibly be held to subject the carrier to the granting of a rebate in violation of Section 6 (7) of the Act, and such has been the uniform view of the Courts.[31]

To know that these conclusions of the lower court are completely in error, it seems necessary only to quote what this court held, in the *American Sheet & Tin Plate case, supra*, pages 406–407, in respect to these subjects; and in response to the same arguments as are here urged:

The appellees urge that the orders are fatally defective because the Commission

[31] Brief for appellees, pp. 42–43, Records and Briefs in United States Cases, United States Supreme Court, October Term 1936, No. 734. That brief bears the names of eminent counsel and the case was orally argued in the Supreme Court by Senator Reed.

failed to make the necessary quasi-judicial findings. They point out that the Commission held that an allowance furnished a means whereby an industry enjoyed a preferential service not accorded to shippers generally, and constituted a refund or remission of a portion of the rate for transportation in violation of section 6 (7) of the Interstate Commerce Act. They assert these conclusions are insufficient to support a cease and desist order because the Commission has not found, as it must to bottom an order on sections 2, 3, and 15 (1) of the Act, that the practice was unreasonable, unjustly preferential, unduly discriminatory, or otherwise unlawful. Respecting section 6 (7) they say that as, by that section and section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowances are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound, but the Commission has, in each case, found that the interchange tracks of the respective industries are reasonably convenient points for the receipt and delivery of interstate shipments and that the industry performs no service beyond those points of

> interchange for which the carrier is compensated under its interstate line-haul rates. These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight.

Also the court below overlooked, in considering ese questions, what this court held in *United tates* v. *Wabash R. Co., et al., supra,* where riffs, seeking to abolish charges for spotting e Staley plant under prior tariffs forced by the ommission, were ordered cancelled. By appli- tion of *Ex Parte 104* principles, carriers had en compelled to establish a charge for spotting at plant, and that I. & S. issue became a part of e Staley supplemental proceeding, which was cided in the *Wabash R. Co.* case. The point ere is that the tariffs ordered cancelled pro- ded for free spotting service, and was held by e Commission not to be transportation. In this riff situation the railroads there contended that e order compelled a discrimination against the taley Company. The opinion there held, page 0:

> This argument ignores the nature of the present proceeding which is to enforce section 6 (7), not sections 2 and 3 (1). Section 6 (7) prohibits departures from the filed tariffs and it is violated, as the Commission has pointed out, when carriers pay

the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge.

The legal situation in *Corn Products Refining Company* v. *United States, supra,* respecting tariff provisions and compensation for services rendered, was very similar and almost identical as to the compensation, to the same questions here involved. Corn Products was the seventy-fourth supplemental proceeding under *Ex Parte 104,* decided first on April 2, 1945,[32] and on rehearing July 1, 1946.[33] At the Commission hearing the industry offered evidence respecting switching at large terminals other than Chicago, respecting what counsel called "characteristics of the American rate structure," respecting services at other industrial plants, data relating to car movement in the industrial district of Chicago, cost studies, descriptions of switching in the Chicago terminal, and evidence of switching involved at particular team tracks and industrial sidings. This evidence was excluded, and sustained in the first Commission report, page 75, as being unnecessary to determine questions relating to spotting the Corn Products plant, or what was meant by "the equivalent of team track or simple switch placement." The report explained that; "We are not

[32] 263 I. C. C. 54.
[33] 266 I. C. C. 181.

here confronted with the interpretation of a statute or a rule or practice published in a tariff, but only with the application of the meaning of expository phrases used by us." In the second report entered July 1, 1[illegible] consideration was given to the Raasch tariff, which became effective in official territory on January 1, 1946, a coordinated railroad attempt to determine a general application of specific time charge for interruptions, interferences, and delays involved in delivery services at industrial plants. That tariff does not apply west of the Mississippi River. The Commission held, pages 196–199, incl., that the tariff did apply at the Corn Products plant, and described its terms fully. The point relevant to questions here considered, is that industry there contended that legality of services at their plant could be determined only in "a proceeding involving the tariff." Answering these contentions the report said:

> "It may not properly be contended that we are deprived of jurisdiction to determine an issue pending before us by the filing of a tariff or that the filing of the tariff automatically requires the institution of another proceeding."

The order, similar to others entered in *Ex Parte 104* proceedings, was attacked in and sustained by the court for the Northern District of Illinois, 69 F. Supp. 869. Only Commission records in that supplement proceeding were

offered. Plaintiff argued that the custom and practice, since construction of the plant, to deliver carload freight without charge in addition to line-haul rates, with the uncontroverted evidence of tariff provisions to provide that spotting service and rates therein to include compensation therefor, controlled and made the Commission order to the contrary unlawful. The court opinion resulted from plaintiff's motion to amend findings of fact and conclusions of law, previously entered, or permit submission of the complete record which was the basis for the main report in *Ex Parte 104*. One of the court findings was that the "partial record produced by plaintiff before this court does not contain the evidence of record as to the practice and custom at these (other) plants." The district court there held, page 873:

> However, even if the record were "complete" in the sense that all the evidence in the original proceeding had been introduced, this court does not have the power to reach a conclusion opposite to that of the Supreme Court in the previously mentioned cases concerning the standards to be applied in determining where the carriers' transportation duty ends. It would therefore have been a futile gesture to have introduced herein the record in the original proceeding. It seems clear that since each supplementary proceeding involves merely the application of the stand-

> ards established in the original proceeding to the physical facts found at the plant under investigation, and since the standards to be applied have already been determined by the Commission and approved by the Supreme Court, the record in each supplementary proceeding is essentially complete in itself.

The court opinion did not discuss the question of tariff provisions and compensation for the services, evidently regarding those as closed or settled issues under prior court decisions. This appears from the court statement, above quoted, which described established standards necessary to application of *Ex Parte 104* principles to a particular plant, which did not include the question of tariffs and compensation. On the general question the court held,

> While an administrative agency should not impose rules based on an inadequate investigation of a problem, it should also, in a case of this sort, not be compelled to re-litigate the basic issues in each supplementary proceeding brought to enforce the rules in situations where violations are found to occur.

Upon appeal to this court the decree of the district court, sustaining the Commission order, was affirmed without opinion. It is here important to know that questions of tariff and compensation applicable to the services there involved, were issues before this court, and apparently

considered in affirming the district court decree. Brief of appellant, in opposition to the motion to affirm, appears to clearly show that these questions were presented and argued in that appeal."

On page 2 of that brief it is alleged that, continuously since 1910, when the plant was constructed, railroads have performed spotting of cars at loading and unloading points, at line-haul rates without added charge, the Chicago rates being regarded as covering the service and including compensation therefor. This is practically identical with the situation herein, as urged by appellees and held by the lower court, as that existed prior to the 1938 tariffs, and as has continued to the present under the Leadville tariff. On page 3 of appellants brief in that case it is stated that witnesses for railroads testified that the questioned switching had always been performed by the railroads, and that line-haul rates were intended to compensate for the spotting service. On page 4 it is stated that at all Chicago industrial plants, where railroads performed the spotting line-haul rates were treated as including compensation therefor, that at no such industry was a charge made in addition to line-haul rates, and that "the Chicago rates were

[34] In the Supreme Court of the United States, October Term 1946. No. 1309, *Corn Products Refining Company, Appellant* v. *United States of America and Interstate Commerce Commission, Appellees*, Brief in Opposition To Motion To Affirm.

constructed with this very idea in view." On page 6 it is stated that during pendency of the proceedings before the Commission, railroads filed the Raasch tariff for the first time specifying with considerable particularity, the circumstances, under which charges in addition to line-haul rates would be made in spotting industrial plants and that the Commission allowed the tariff to go into effect. Appellant argued that since it provided for the extent of terminal services, that matter was no longer for Commission inference or determination, under standards previously used, and that after its effectiveness charges could lawfully be collected only in accordance with and under its provisions. It is then stated that although the Commission found the tariff applicable at the Corn Product plant, and that it was not found to be unreasonable or otherwise unlawful, it was ruled as inoperative, and that the lower court sustained that ruling without opinion, merely adopting its conclusion.

The brief stated, pages 8–9, three major and six subordinate questions, of which two subordinate and one major related to the question of tariff provisions and compensation for services being included in the line-haul rates. One of those questions, 2 (c), was whether, in the face of uncontradicted evidence that line-haul rates do include compensation for the service, without contrary testimony, the Commission could law-

sired and expected by the lower court. This belief was based upon the findings, particularly (4) and (5) (R. 300), and the order (R. 302), which stated that the cases were remanded to the Commission "for such action as it may find justifiable in the premises." Astonishingly finding (6) and (7) in the last action (R. 453–454), is to the effect that no appeal was taken from the prior decisions, that the orders of October 14, 1946, were vacated, that reconsideration was based upon the existing record, and that no further hearing was held, no further evidence received, and no further briefs permitted. Upon these findings conclusion (1) held res adjudicata the question as to compensation for service being included in the line-haul rates (R. 459). If any arbitrariness should attach to any part of proceedings before the Commission and in court, that would certainly attach to these court findings and conclusions. If the finding that no further hearing was held, no further evidence received, and no further briefs permitted, intend to imply that the Commission affirmatively refused a petition for rehearing, an offer of further evidence, and submission of further briefs, that is unsupported and unwarranted by the facts, record or otherwise. The Commission report is the only record evidence on that subject (R. 372–373). After stating that all proffered evidence had been received, that the existing record contained all

material facts and that a further hearing would serve no purpose, the report concluded, "This was impliedly conceded by all parties as no request for further hearing to introduce additional evidence was made." The lower court could not know whether or not further briefs were submitted, since there is no record on that subject. We may be certain that no such briefs were submitted to the Commission or were refused consideration, for had that happened the record thereof would have been submitted to the court. Such findings relate to arbitrariness and if supported by record facts would justify annulment of the orders. The findings appear to represent a desperate effort to locate some valid legal reason as support for the court decree, which appears hopeless on any other basis. Here the court findings are in error because unsupported by and contrary to the facts.

The conclusion that questions relating to compensation are res adjudicata is obvious error, if for no other reason because the prior court decision did not annul the orders but only temporarily enjoined them, pending reconsideration expected to restate and clarify the bases for those orders. Also under the court remand and the findings of fact and conclusions of law herein entered, the entire record in the first actions are incorporated as a part of the actions here appealed. In effect this is an appeal from both

the first and last decisions of the lower court. Also, as the court finding (6) noted, the prior orders were vacated, and only the legality of new orders, never before decided by the court, are concerned in this appeal. It is believed beyond the realm of possibility, to find any reasonable basis for a charge of arbitrariness, in the Commission's painstaking considerations and decisions in these cases.

CONCLUSION

For the foregoing reasons the decision of the district court should be reversed, the injunction ordered dissolved, and the petition dismissed.

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JANUARY 1950.

APPENDIX I

Interstate Commerce Act, February 4, 1887, c. 104, Part 4, 24 Stat. 379, as amended.

Section 1 (3) (a) provides:

> The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier, operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigera-

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tion or icing, storage, and handling of property transported. * * * (49 U. S. C. 1 (3) (a).)

Section 2 provides:

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Section 3 (1) of the Act provides:

It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect

whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description. (49 U. S. C. 3 (1).)

Section 6 (1) provides:

That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the

use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part. (49 U. S. C. 6 (1).)

Section 6 (7) provides:

No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (49 U. S. C. 6 (7).)

Section 12 (1) provides:

The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the

business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. (49 U. S. C. 12 (1).)

Section 13 provides in part:

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on

its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. * * * (49 U. S. C. 13 (1), (2).)

Section 15 provides in part:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such

carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that ~~the same does or~~ will exist, and shall not thereafter publish, demand, or collect any rate, fare or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * * * *

(13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a rea-

sonable charge as the maximum to be paid by the carrier or carriers for the services so rendered for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

(14) The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this part. (49 U. S. C. 15 (1), (13), (14).)

The Commission's 57th Annual Report to Congress (November 1, 1943), in discussing the Commission's attempt to correct problems of rebates given under the guise of terminal service, states (pp. 57, 58–59):

> After this decision of the Supreme Court, an effort was made to have the railroads canvass the situation at other plants where the industry was either performing the spotting service with its own power and receiving an allowance from the railroads, or where the latter were performing the spotting service under direction of the industry without charge in addition to the line-haul rate, with a view to bringing such practices into conformity with the principles announced by us and approved by the Supreme Court. We have met with no success in this effort. The carriers have failed voluntarily to apply these established principles, with the result that the practice of paying allowances or performing free switching services is not uniform in all parts of the country or even on the lines of single carriers.

The task of enforcing compliance with these understandable principles is of gigantic proportions, but seemingly one that must be met if uniform practice in respect to allowances and switching services and equality of treatment is to be provided for all shippers. We are investigating the situations at a number of plants.

Because of the time that has elapsed since the original hearing, conditions have changed at some of the plants, necessitating further hearings. In view of the reluctance of both the carriers and the industries voluntarily to give us all the facts upon which we can make a proper determination, we have found it necessary to conduct field investigations through our own employees. This is time consuming. In at least one case, where the industry was performing the spotting service with its own power and the allowance received therefor was condemned as unlawful, the industry disposed of its power and requested the respondents to perform the service. This the respondents did, making a charge against the industry for spotting services. We approved the imposition of the spotting charge. The case is now before the Supreme Court for decision. In attacking our order in the lower court, the industry contended that it was unjustly discriminatory and unduly prejudicial to require it to pay a spotting charge when its competitors receive such service from the carriers without charge. We are investigating all such alleged preferred services with a view to determining whether the service performed at such plants by the carriers is in excess of that which the carriers are obligated to perform under their line-haul rates.

APPENDIX II

TATIONS OF EX PARTE 104, PART II AND SUPPLEMENTS THERETO

	Decided
Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses—Part II, Terminal Services.	May 14, 1935 209 I. C. C. 11
Sup. Rep.—Interlake Iron Corporation, Toledo, Ohio. Iron corporation.	May 14, 1935 209 I. C. C. 51
Sup. Rep.—Detroit Edison Company, Detroit, Mich. Power plant.	May 14, 1935 209 I. C. C. 55
Sup. Rep.—Universal Atlas Cement Company Steelton, Minn. Cement manufacturing plant.	May 14, 1935 209 I. C. C. 61
Sup. Rep.—Sheffield Steel Corporation, Kansas City, Mo. Steel plant.	May 14, 1935 209 I. C. C. 64
Sup. Rep.—Standard Oil Co. of Louisiana, North Baton Rouge, La. Oil refinery.	May 14, 1935 209 I. C. C. 68
eport on Rehearing in 5th Sup. Rep.	July 12, 1943 256 I. C. C. 5
Sup. Rep.—East Chicago Dock Terminal Co., East Chicago, Ind. Commercial dock.	May 14, 1935 209 I. C. C. 73
Sup. Rep.—Ford Motor Company, Detroit, Mich. Automobile manufacturer.	May 14, 1935 209 I. C. C. 77
Sup. Rep.—Keystone Steel & Wire Company, Peoria, Ill. Steel plant.	May 14, 1935 209 I. C. C. 82
Sup. Rep.—Pittsburgh Steel Company, Monessen, Pa. Steel plant.	May 14, 1935 209 I. C. C. 87
eport on Rehearing in 9th Sup. Rep.	Oct. 1, 1940 241 I. C. C. 562
th Sup. Rep.—Magnolia Petroleum Company, Chaison, Tex. Refinery.	May 14, 1935 209 I. C. C. 93
th Sup. Rep.—Allegheny Steel Company, Brackenridge, Pa. Steel and alloy products manufacturer.	June 7, 1935 209 I. C. C. 273
th Sup. Rep.—Minnesota By-Products Coke Co., St. Paul, Minn. Coke-manufacturing company.	June 24, 1935 209 I. C. C. 421
h Sup. Rep.—Humble Oil & Refining Company, Baytown, Tex. Oil refinery.	July 8, 1935 209 I. C. C. 727
h Sup. Rep.—Timken Roller Bearing Company, Canton, Ohio. Steel products manufacturer.	June 24, 1935 209 I. C. C. 441
h Sup. Rep.—Weirton Steel Company, Weirton, W. Va. Manufacturer of tin plate, sheet iron, strip steel, slabs, billets, sheet bars, and coke byproducts.	June 24, 1935 209 I. C. C. 445

	Decided
16th Sup. Rep.—Mexican Petroleum Corporation of Louisiana, Inc., Destrehan, La. Refinery.	June 25, 1935 209 I. C. C. 394
17th Sup. Rep.—Pittsburgh Plate Glass Company, Pittsburgh, Pa. Industrial plant.	June 25, 1943 209 I. C. C. 467
18th Sup. Rep.—American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pa., and Wellsville, Ohio. Steel manufacturer and tin plate company.	July 5, 1935 209 I. C. C. 719
19th Sup. Rep.—Inland Steel Company, Indiana Harbor, Ind. Producer of iron and steel articles and coke by-products.	July 11, 1935 209 I. C. C. 747
20th Sup. Rep.—Wickwire-Spencer Steel Company, Harriet, N. Y. Manufacturer of pig iron, wire, wire rods, wire fence, wire mesh, and wire nails.	July 11, 1935 209 I. C. C. 751
21st Sup. Rep.—Gulf Refining Company, Port Arthur, Tex.	July 11, 1935 209 I. C. C. 756
22d Sup. Rep.—Granite City Steel Company, Granite City and Madison, Ill. Steel-manufacturing plant.	July 11, 1935 209 I. C. C. 761
23d Sup. Rep.—Celotex Company, Marrero, La. Celotex board manufacturer.	July 11, 1935 209 I. C. C. 764
Report on Rehearing in 23d Sup. Rep.	Apr. 17, 1941 245 I. C. C. 105
24th Sup. Rep.—Texas Company, Houston, Tex. Refinery.	July 11, 1935 209 I. C. C. 767
25th Sup. Rep.—Western Paving Company, Dougherty, Okla. Paving Company.	July 11, 1935 209 I. C. C. 770
26th Sup. Rep.—Detroit Harbor Terminals, Inc., Detroit, Mich. Warehouse and dock.	July 13, 1935 209 I. C. C. 787
27th Sup. Rep.—Great Southern Lumber Corapany-Bogalusa Paper Company, Bogalusa, La. Logging and lumber business and paper company.	July 12, 1935 209 I. C. C. 793
28th Sup. Rep.—St. Louis Gas & Coke Corporation, Granite City, Ill. Coke and coke by-products producer.	July 12, 1935 209 I. C. C. 797
29th Sup. Rep.—Kansas City Power & Light Company, Kansas City, Mo. Electric power plant.	July 19, 1935 210 I. C. C. 103
30th Sup. Rep.—Great Lakes Steel Corporation, Ecorse (Detroit), Mich. Steel plant.	July 12, 1935 210 I. C. C. 9
31st Sup. Rep.—Iron Ore Mining Companies Stock Pile, Mesabi Iron Range district of Minnesota. Iron ore mining company.	Aug. 12, 1935 210 I. C. C. 254
32d Sup. Rep.—Studebaker Corporation, South Bend, Ind. Automobile manufacturing plant.	July 19, 1935 210 I. C. C. 137
33d Sup. Rep.—Interlake Iron Corporation, Duluth, Minn. Engaged in production of pig iron, coke, coke oven byproducts, and selling of coal.	July 29, 1935 210 I. C. C. 205

	Decided
34th Sup. Rep.—Crane Company, Chicago, Ill. Manufacturer of plumbing and steam-fitting supplies, pipe, and valves.	July 29, 1935 210 I. C. C. 210
35th Sup. Rep.—West Leechburg Steel Company, Leechburg, Pa. Producer of cold-rolled strip and skelp steel.	July 29, 1935 210 I. C. C. 213
36th Sup. Rep.—Alabama By-Products Corporation, Tarrant (N. Birmingham), Ala. Producer of coke, benzol, acids, tar, and other coal byproducts.	Sept. 25, 1935 210 I. C. C. 644
37th Sup. Rep.—Petoskey Portland Cement Company, Petoskey, Mich. Cement manufacturing plant.	Aug. 6, 1935 210 I. C. C. 242
38th Sup. Rep.—Louisville Cement Company, Speeds, Ind. Manufacturer of cement.	Aug. 12, 1935 210 I. C. C. 293
Report on rehearing in 38th Sup. Rep	Feb. 1, 1937. 220 I. C. C. 88
39th Sup. Rep.—Standard Steel Car Company, Hammond, Ind. Manufacturer of railway equipment and cars.	Aug. 12, 1935 210 I. C. C. 296
40th Sup. Rep.—General American Tank Car Corp., East Chicago, Ind. Engaged in building repairing, and leasing freight cars of various types, including tank and refrigerator cars.	Aug. 14, 1935 210 I. C. C. 383
41st Sup. Rep.—Pacolet Manufacturing Company, Pacolet, S. C. Operates a cotton mill.	Aug. 23, 1935 210 I. C. C. 475
42d Sup. Rep.—Marion Steam Shovel Company, Marion, Ohio. Power-shovel and machinery manufacturing plant.	Sept. 28, 1935 210 I. C. C. 655
43d Sup. Rep.—Pittsburgh Plate Glass Company, Crystal City, Mo. Plate glass manufacturer.	Sept. 12, 1935 210 I. C. C. 527
44th Sup. Rep.—Texas Company, Port Arthur, Tex. Engaged in refining, manufacture; and sale of petroleum and its products.	Jan. 15, 1936 213 I. C. C. 583
45th Sup. Rep.—Goodman Lumber Company, Goodman, Wis. Lumber and chemical company.	Feb. 8, 1936 214 I. C. C. 89
46th Sup. Rep.—Wheeling Steel Corporation, Steubenville, Ohio, East Steubenville, W. Va., Benwood, W. Va., and Martins Ferry, Ohio. Industrial plants.	Feb. 3, 1936 214 I. C. C. 53
47th Sup. Rep.—Uvalde Rock Asphalt Company, Cline, Tex. Quarries, crushes, and ships phosphoric stone.	Aug. 24, 1936 218 I. C. C. 271
48th Sup. Rep.—John Morrell & Company, Ottumwa, Iowa. Meat-packing plant.	May 8, 1936 215 I. C. C. 431
49th Sup. Rep.—Commonwealth Edison Company, Chicago, Ill. Electric generating stations.	Apr. 1, 1936 215 I. C. C. 173
50th Sup. Rep.—William Wharton, Jr., & Co., Inc., Easton, Pa. Steel company.	May 19, 1936 215 I. C. C. 623

	Decided
51st Sup. Rep.—Midvale Company, Nicetown, Pa. Manufactures and sells steel products.	May 19, 1936 215 I. C. C. 626
52d Sup. Rep.—Acme Steel Company, Riverdale, Ill. Manufacturer of strip steel.	Apr. 28, 1936 215 I. C. C. 373
53d Sup. Rep.—A. O. Smith Corporation, Milwaukee, Wis. Manufacturer of automobile frames, gear frames, and axle housing for automobile industry, heavy pipe and pipe couplings, petroleum cracking and distilling vessels for oil industry.	May 19, 1936 215 I. C. C. 534
54th Sup. Rep.—Warren Foundry & Pipe Corporation, Phillipsburg, N. J. Manufacturer of cast-iron pipe fittings and special fittings.	May 21, 1936 215 I. C. C. 553
55th Sup. Rep.—A. E. Staley Manufacturing Company, Decatur, Ill. Grain products manufacturer.	May 22, 1936 215 I. C. C. 556
Report on rehearing in 55th Sup. Rep.	May 6, 1941 245 I. C. C. 383
56th Sup. Rep.—Chicago By-Product Coke Company, Chicago, Ill. Producer of gas, coke, and coke by-products such as sulphate of ammonia and tar.	May 28, 1936 216 I. C. C. 8
57th Sup. Rep.—American Steel Foundries, Indiana Harbor, Ind. Manufacturer of steel castings and railroad specialties.	May 28, 1936 216 I. C. C. 13
58th Sup. Rep.—Louisiana Development Company, Winnfield, La. Conducts a rock-salt mining operation.	Aug. 24, 1936 218 I. C. C. 276
59th Sup. Rep.—Red River Lumber Company, Westwood, Calif. Lumber company.	July 26, 1939 234 I. C. C. 287
Report on rehearing in 59th Sup. Rep.	Oct. 4, 1943 255 I. C. C. 370
60th Sup. Rep.—J. Neils Lumber Company, Libby, Mont. Lumber mill.	May 27, 1940 238 I. C. C. 543
Report on rehearing in 60th Sup. Rep.	Dec. 2, 1941 248 I. C. C. 283
61st Sup. Rep.—Medford Corporation, Medford, Oreg. Conducts lumbering and mill-work operations and ships finished and rough materials.	Sept. 4, 1940 241 I. C. C. 407
62d Sup. Rep.—Chiloquin Lumber Company, Chiloquin, Oreg. Lumber company.	Sept. 28, 1940 241 I. C. C. 495
Report on rehearing in 62d Sup. Rep.	Apr. 17, 1941 245 I. C. C. 112
63d Sup. Rep.—Lamm Lumber Company, Modoc Point, Oreg. Lumber mill and box factory.	May 27, 1941 245 I. C. C. 575
64th Sup. Rep.—Silver Falls Timber Company, Silverton, Oreg. Powerhouse, sawmill, planing mill, sheds for storage of lumber, yard for storage of rough lumber, and log pond, and auxiliary facilities.	May 27, 1941 245 I. C. C. 509

	Decided
65th Sup. Rep.—Inland Empire Paper Company, Millwood, Wash. Paper manufacturer.	July 9, 1941 246 I. C. C. 127
66th Sup. Rep.—Republic Steel Corporation, Buffalo, N. Y. Steel company.	Nov. 7, 1942 253 I. C. C. 595
67th Sup. Rep.—Hanna Furnace Corporation, Buffalo, N. Y. Producer and shipper of pig iron and occasional loads of other freight, including machinery.	Nov. 11, 1942 253 I. C. C. 643
68th Sup. Rep.—Tonawanda Iron Corporation, North Tonawanda, N. Y. Manufacturer of pig iron.	Feb. 13, 1943 255 I. C. C. 231
69th Sup. Rep.—Kingan & Company, Indianapolis, Ind. Packing company (meat).	June 2, 1943 255 I. C. C. 531
Sup. Rep.—American Bridge Company, Ambridge and Pencoyd, Pa.; Trenton, N. J.; Elmira Heights, N. Y.; and Toledo, Ohio. Engaged in fabrication of steel.	Sept. 11, 1943 Unreported
Sup. Rep.—Sharon Steel Hoop Company, Sharon, Pa. Operates steel mills.	Sept. 11, 1943 Unreported
Sup. Rep.—Wickwire Brothers, Inc., Cortland, N. Y. Manufacturing of wire nails, rods, fencing, wire screen cloth, blooms, bars, etc.	Sept. 11, 1943 Unreported
Sup. Rep.—McClintic-Marshall Corporation, Leetsdale, Pa. Manufacturer of stand pipes, blast furnaces, gas holders, barges, transmission towers, etc.	Sept. 11, 1943 Unreported
Sup. Rep.—Worth Steel Company, Claymont, Del. Manufacturer of steel plates, blue annealed sheets, flange and dished heads and nozzles.	Sept. 11, 1943 Unreported
70th Sup. Rep.—Decatur Soya Bean Products Co.	Feb. 6, 1945 259 I. C. C. 471
71st Sup. Rep.—Archer-Daniels, Midland Co.	Feb. 6, 1945 259 I. C. C. 455
72d Sup. Rep.—Phelps Dodge Corp.	Apr. 23, 1945 262 I. C. C. 371
73d Sup. Rep.—Spencer Kellogg and Sons, Inc.	Mar. 5, 1945 262 I. C. C. 205
74th Sup. Rep.—Corn Products Refining Co.	Apr. 2, 1945 266 I. C. C. 181 262 I. C. C. 57
75th Sup. Rep.—American Smelting	Oct. 1, 1945 263 I. C. C. 719
76th Sup. Rep.—U. S. Smelting	Oct. 1, 1945 263 I. C. C. 749
77th Sup. Rep.—Anaconda Copper Mining Co.	Oct. 1, 1945 264 I. C. C. 103 266 I. C. C. 387 268 I. C. C. 167

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

UNITED STATES SMELTING REFINING AND MINING COMPANY, AMERICAN SMELTING & REFINING COMPANY, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 474) is unreported. The basic report of the Commission is reported at 209 I. C. C. 11. The supplemental report of the Commission concerning the United States Smelting Refining and Mining Company

(R. 315) is reported at 270 I. C. C. 385; the supplemental report concerning the American Smelting and Refining Company (R. 364) is reported at 270 I. C. C. 359.

JURISDICTION

The final decree of the three-judge district court was entered on January 10, 1949 (R. 463). Petition for appeal was filed March 7, 1949 (R. 464) and allowed the same day (R. 465). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted on October 10, 1949 (R. 1403).

STATUTE INVOLVED

Section 6(7) of the Interstate Commerce Act provides as follows:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor

extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. [49 U. S. C. § 6(7).]

QUESTIONS PRESENTED

1. Whether in proceedings supplemental to, and designed to implement the policies enunciated by, a basic report of the Interstate Commerce Commission concerning the practices of carriers in furnishing to industries services in excess of line-haul transportation, which basic report has been approved by this Court, it is enough for the Commission to determine the points at each plant where line-haul transportation begins and ends in order to forbid as a violation of Section 6(7) of the Interstate Commerce Act the furnishing of "spotting" services beyond such points without receiving compensation for such services in addition to the rate for line-haul transportation.

2. Whether the Commission's determination of the points at each plant where line-haul transportation ended and intra-plant service began was without evidentiary support.

STATEMENT

The facts are stated in considerable detail in the brief of the Interstate Commerce Commission, to which the Court is respectfully referred. For the purposes of the arguments advanced in this brief, they may be briefly summarized.

The orders of the Commission here concerned resulted from the seventy-fifth and seventy-sixth in

a series of supplemental proceedings instituted by the Commission in order to implement, with respect to particular industrial plants and carriers, the policies enunciated by the Commission in *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, 209 I. C. C. 11 (May 14, 1935). That report set forth standards for the determination of the amount of terminal switching and spotting service which may properly be supplied by carriers under their line-haul rates. The standards laid down in this basic report were upheld in *United States* v. *American Sheet and Tin Plate Company*, 301 U. S. 402, and the orders of the Commission in other supplemental proceedings similar to those here concerned have invariably been upheld upon review by the district courts or this Court.[1]

The basic report expressed the conclusions of the Interstate Commerce Commission after proceedings which the Commission instituted on its own motion in July, 1931, and which were the culmination of an investigation, during a period of nearly four years, of hundreds of industrial plants in every section of the country. The findings and conclusions of the Commission, and the subsequent implementation of these findings and conclusions, were summarized by Chief Justice Stone for the Court in

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[1] E.g., *United States* v. *Wabash R. Co.*, 321 U.S. 403; *Corn Products Refining Co.* v. *United States*, 331 U.S. 790; *Anaconda Copper Mining Co.* v. *United States*, 77 F. Supp. 611 (D. Mont., 1947). See p. 17, *infra*.

United States v. *Wabash R. Co.*, 321 U. S. 403, 406-408:

> In *Ex parte 104*, the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, or the payment to the industries of allowances for its performance by them, is in violation of § 6(7) of the Act.
>
> The Commission, in its main report in *Ex parte 104*, recognized that by railway tariff practice in this country the rates on carload traffic moving to or from any city or town apply to so-called "switching" or "terminal" districts and entitle each industry within such a district to have the traffic delivered directly to and taken from its site. By this method of delivery and by use of private tracks of the industry the railroads are saved the expense

of maintaining more extensive terminal facilities, the service and cost of delivery within the switching district being comparable to that of delivery on team tracks or sidings or at way stations. But in the case of large industries having extensive plant trackage the Commission found that cars hauled to the industry usually come to rest at nearby interchange tracks, after which the intraplant distribution of the cars is made at times and in a manner to serve the convenience of the industry rather than that of the carrier in completing its transportation service.

In determining in such circumstances the point at which the carrier service ends and the service in placing the cars so as to meet the convenience of the industry begins, the Commission stated that the line of demarcation "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant," 209 I. C. C. at 34. It added, "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that per-

formed in simple switching or team-track delivery . . ." 209 I. C. C. at 44-5.

The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered. It is for this reason that the Commission, in carrying into effect the principles announced in *Ex parte 104*, has found it necessary to proceed to a series of supplemental investigations of the spotting service rendered at particular plants. Accordingly the Commission made no order on the foot of its main report, but following a series of supplemental reports, including the present one, each detailing the facts found as to the spotting service rendered at the particular plant investigated, the Commission has made cease and desist orders, applicable to that service, a number of which this Court has upheld on review. See *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *American Sheet &*

Tin Plate Co., supra, 408; *United States* v. *Pan American Petroleum Corp., supra,* 158; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. Co.,* 320 U. S. 368, 378 and cases cited.

In the instant cases, the Commission, through its own agents, made on-the-spot investigations of switching conditions at each smelting plant concerned and thereafter, on May 8 and 29, 1944 (R. 136, 578), held formal hearings in each case. At these hearings there was voluminous testimony both by the investigating agents of the Commission and by witnesses for the carriers and the industries. Numerous and varied exhibits were introduced, including analyses and breakdowns of switching operations at the plants in question and maps of the plant area, buildings and system of tracks at each plant. Thereafter, on October 14, 1946, the Commission entered a report and order in each case.[2] The Commission determined, with respect to each smelting plant here concerned, the points within each plant constituting reasonably convenient points for delivery to and receipt from the respective smelters, of carload freight by the carriers—*i.e.*, the respective points within each plant where line-haul transportation begins and ends.[3] It

[2] That relating to American Smelting (R. 28) is reported at 266 I.C.C. 349; that relating to United States Smelting (R. 271) at 266 I.C.C. 476. Commissioners Alldredge and Mahaffie dissented in each case.

[3] Specifically, the Commission found, with respect to the plants of American Smelting, that the reasonably convenient points were the "plant yard" at Garfield, Utah, the "hold tracks" at Murray, Utah, and the "flat yard" at Leadville,

further determined that the carriers' line-haul rates did not include compensation for any terminal switching services beyond such designated points and, finally, that the carriers' performance of terminal switching services beyond such designated points, without charge in addition to the line-haul rates, was in violation of Section 6(7) of the Act. Accordingly, the Commission's orders required the carriers to cease and desist from such violations.

The district court, upon review of these orders, found that the Commission had based them "upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants"; that there was no evidence before the Commission to justify such a finding; and that the Commission had not "presumed to exercise the authority which is intended to be conferred under *Ex Parte 104* in that the order made is not specifically based upon that authority" (R. 451). The court temporarily enjoined the enforcement of the orders and remanded the cases to the Commission "for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent powers to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in *Securi-*

Colorado. It found such point to be the "assembly yard" at the Midvale, Utah, plant of United States Smelting. (R. 450.)

ties and Exchange Commission v. *Chenery Corporation* '. . ." (Fng. 5, R. 451-452).

On December 5, 1947, the Commission reopened the proceedings for reconsideration upon the existing record (R. 453), and on May 18, 1948, issued the orders here involved, together with the reports upon which they are based. The Commission made findings substantially similar to those upon which it had based its prior orders, except that it expressly based its orders on the authority of *Ex Parte No. 104* and eliminated any findings as to whether the line-haul rates are reasonable and do or do not include compensation for terminal switching service beyond the designated points.[5]

Upon the district court's review of the new orders, the court in substance reaffirmed and re-

[4] 332 U.S. 194.

[5] The Commission's reports explicitly stated (Fng. 8, R. 454) that:

> It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in *Ex Parte No. 104*, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas.

In addition, the Commission's report involving the smelters of the American Smelting & Refining Company, states (*ibid.*):

> We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein.

made its original findings and, in addition, found (Fng. 11, R. 455) that there was no evidence before the Commission to support any of the findings upon which the Commission had based its orders of May 18, 1948, including the Commission's determinations with respect to the location of reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the carriers (Fngs. 12, 13, R. 455-456). It concluded that as a matter of law the carriers were obliged, under *Ex Parte No. 104*, to perform the terminal switching services here involved without charges in addition to their line-haul rates and that consequently the carriers had not been violating Section 6(7). It further concluded as a matter of law (R. 460) that the Commission's explicit disclaimer of findings as to whether the carriers' line-haul rates included compensation for the terminal switching services involved had deprived its finding of violations of Section 6(7), and its orders to cease and desist, of basic findings of fact essential to their support.[6] The district court permanently enjoined the enforcement of the Commission's orders of May 18, 1948 (R. 463).

[6] The district court also concluded that the Commission's orders violate Sections 1(5) (a) and 3(1) of the Act, and that findings under Section 6(1) are necessary in order to require carriers to state line-haul and terminal switching charges separately (R. 460-462).

SUMMARY OF ARGUMENT

I

In execution of its duty to administer the Interstate Commerce Act, the Commission is empowered to prescribe the extent of the legal obligations of rail carriers in performing line-haul transportation. *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402. The Commission's basic definition of line-haul transportation and its specific applications of that definition have been uniformly upheld by this Court. And the Commission's power to prohibit the rendering of services by a carrier in excess of its line-haul obligation unless it makes separate charge for such services is likewise established. *United States* v. *American Sheet and Tin Plate Co., supra.* That power may not be frustrated by the publishing of line-haul tariffs which purport to include charges for services not part of line-haul transportation.

II

The Commission's determinations with respect to the points in the particular plants where line-haul transportation begins and ends are supported by ample evidence, and it is settled that in such circumstances the Commission's findings on such questions should not be disturbed by the courts. *United States* v. *Wabash R. Co.*, 321 U. S. 403, 408.

ARGUMENT

Introduction

In *Ex Parte No. 104*, 209 I.C.C. 11, the Interstate Commerce Commission established general standards for determining the amount of switching service which may properly be performed by carriers as a part of line-haul transportation. Its purpose in establishing these standards was to lay the basis for the removal of the many discriminations which it found to result from carriers rendering varying services at industrial plants without specific charges therefor. Since the physical arrangements and switching needs of plants differ widely not only among industries, but among plants within an industry, it was obvious that discrimination would be inevitable unless the extent of line-haul transportation was defined, and the railroads required to make separate charges for services beyond those included within the line-haul obligation. If line-haul rates are interpreted as covering all switching and spotting services, it is evident that a plant which requires many such services (either because of legitimate industrial needs or as the result of an inefficient plant layout) will receive more service than a plant requiring little switching and spotting, but will pay the same rates. This obviously amounts to an unlawful discrimination of the sort which *Ex Parte No. 104* was intended to prevent.

In the supplemental proceedings, such as the present ones, to apply the general standards of *Ex Parte No. 104* to specific cases, the Commission has been confronted with the factual problem of determining in each situation precisely where line-haul transportation begins and ends. Its determinations in this regard have been uniformly sustained by this Court, and it has been repeatedly recognized that the questions involved are questions of fact upon which the Commission's expert judgment must be sustained if supported by evidence.

Without in terms challenging this general proposition, and in the face of voluminous evidence to support the Commission's findings, the court below set aside the Commission's fact determinations as to the limits of line-haul service to the plants here involved. And it held that the Commission had no power to require discontinuance of the switching and spotting services found by it to constitute unlawful rebates under Section 6(7) of the Interstate Commerce Act and that such an order would be possible only under Section 6(1) upon which the Commission did not rely.[7] An order under Section 6(7) could not be sustained, the court held, unless the Commission determined

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[7] Section 6(1) requires rate schedules to "state separately all terminal charges * * * and all other charges which the Commission may require, all privileges or facilities granted or allowed * * *." 49 U.S.C. 6(1).

that the line-haul rates did not cover the extra services, and that the tariffs contained no provision for such services. We propose to show that this holding cannot be reconciled with repeated decisions of this Court sustaining orders of the Commission which contained no such determinations.

I

The Interstate Commerce Commission Has the Power and Duty to Determine Where Railroad Line-Haul Transportation Begins and Ends and to Forbid Railroads to Render Services in Excess of Their Line-Haul Obligations Unless Adequate Additional Charges Are Made for the Additional Services

Section 6(7) of the Interstate Commerce Act provides as follows:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares,*

> *and charges so specified,* nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (Emphasis added.)

In *Ex Parte No. 104,* 209 I.C.C. 11, the Commission drew a line of demarcation between the service rendered by a carrier as a part of its line-haul transportation and the service rendered for the convenience of the industry before line-haul operations begin or after they end. The latter were found to constitute illegal rebates under the above section unless adequate separate charges were collected therefor. The Commission found that the line "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant" (209 I.C.C. at 34). And in elaboration of this principle the Commission stated:

> When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, * * * the service beyond the point of interruption or

> interference is in excess of that performed in simple switching or team-track delivery. [209 I.C.C. at 44-45.]

The principles of *Ex Parte No. 104* have been applied by the Commission in numerous supplemental proceedings, and in each case in which it has ordered the discontinuance of the granting of the illegal rebates involved in the gratuitous furnishing of services by the railroads in excess of their line-haul obligations, its determination has been sustained by the courts.* In the first of these cases, *United States* v. *American Sheet and Tin Plate Co.*, 301 U. S. 402, 408, the Court held:

> The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service. Since the Commission finds that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed, there is power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it.

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* *United States* v. *American Sheet and Tin Plate Co.*, 301 U.S. 402; *Goodman Lumber Co.* v. *United States*, 301 U.S. 669; *A. O. Smith Corp.* v. *United States*, 301 U.S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156; *United States* v. *Wabash R. Co.*, 321 U.S. 403; *Hanna Furnace Co.* v. *United States*, 323 U.S. 667; *Corn Products Refining Co.* v. *United States*, 331 U.S. 790.

This Court has consistently held that determination of where line-haul transportation stops presents a question of fact to be decided in each case and has given full scope to the familiar rule that the Commission's determinations of fact are conclusive if supported by evidence. Thus in *United States* v. *Wabash Railroad Company*, 321 U. S. 403, 408, the Court, through Chief Justice Stone, stated that "this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."[9] That the court below failed to follow this standard in assessing the factual questions here presented is shown in Point II, *infra*, and in the comprehensive brief filed herein by the Interstate Commerce Commission.

Apart from its conclusions as to the facts, the court below found the Commission's orders defective as a matter of law in several respects discussed below. Each of these determinations rests on contentions which have been presented to and rejected by this Court in similar cases.

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[9] Accord: *United States* v. *American Sheet and Tin Plate Co.*, 301 U.S. 402, 408; *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156, 158; *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. Co.*, 320 U.S. 368, 378 and cases cited; *Elgin, J. & E. Ry. Co.* v. *United States*, 18 F. Supp. 19 (N.D. Ind.); *Inland Steel Co.* v. *United States*, 23 F. Supp. 291 (N.D. Ill.), affirmed, 306 U.S. 153; *Anaconda Copper Mining Co.* v. *United States*, 77 F. Supp. 611 (D. Mont.).

A. *The Lack of Findings as to Whether the Line-Haul Rates Include Switching and Spotting Charges*

The court below held that the failure of the Commission to include a determination "as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved" deprived its findings of violation of Section 6(7) of the Act "of basic findings of fact essential to support such findings" (Concl. 4, R. 460; see Concls. 1, 2, 3, 5, 7, 8, R. 459-462). This holding is premised on the assumption that if line-haul rates are calculated to include adequate compensation for spotting and switching services, the Commission is powerless under Section 6(7) to require segregation of the line-haul rates from the switching rates. If this view were correct, *Ex Parte No. 104* supplemental hearings would be converted into rate hearings, in which the task of the Commission would be to determine in each case whether the line-haul rate represented fair compensation for the sum total of services performed.

The district court appears to have misconceived the scope and purpose of *Ex Parte No. 104* proceedings. In *Ex Parte No. 104* it was found that line-haul rates do not generally include spotting and switching services beyond a certain point. It was determined that to achieve uniformity and prevent discrimination, all line-haul rates should

be made to conform with this principle, and that additional services should bear additional and separate charges. If the Commission were to be prevented from accomplishing this result in a situation in which the line-haul rate might be thought to cover the additional services, uniformity in the line-haul obligation would be impossible of achievement. The segregation of rates required by *Ex Parte No. 104* would be wholly frustrated and discrimination in the character of services rendered to industries which pay identical rates would be facilitated. The Commission, having lawfully determined that line-haul rates should cover only line-haul transportation as that term is defined by it (*United States* v. *American Sheet and Tin Plate Co., supra*), a carrier charged with failure to conform to the prescribed standards should not be heard to raise as a defense the very fact that its line-haul rates are not, in fact, rates solely for line-haul transportation.[10]

The precise contention here accepted by the court below was rejected in *Corn Products Refining Co.* v. *United States*, 331 U. S. 790, which in-

[10] A refinement of this argument which seems equally unsound is the suggestion that if the line-haul rates cover the switching and spotting services, the result of the Commission's order would be to require double payment for the same service. Even if this were true, there would be nothing to prevent necessary readjustment of the line-haul rate. It is obvious that if line-haul rates unlawfully include a charge for non-line-haul services, those rates are improper, and in case of a conflict between a valid Commission order and a tariff, it is plain that the latter must yield. *Cf. B. & O. Railroad Co.* v. *United States*, 305 U.S. 507, 525-526.

volved a similar *Ex Parte No. 104* supplemental proceeding. There, as here, the Commission made no finding as to whether the line-haul rate did or did not include compensation for switching and spotting services. In fact it excluded evidence on this question, and the appellant in that case laid great stress in this Court upon the exclusion by the Commission of evidence indicating that the line-haul rates there involved "have always been considered as including compensation to the railroads for the full service of placing cars for loading and unloading at all industries where the railroads perform the spotting, including appellant's plant at Argo and that therefore, the imposition of an added charge would require appellant to pay twice for a service already compensated for by the line-haul rates" (Statement as to Juris., O.T. 1946, No. 1309, p. 14; and see Brief in Opp. to Motion to Affirm, *ibid.*, p. 15). This Court granted the motion of the United States to affirm the decision of the district court upholding the Commission's order.

B. *The Inclusion in Line-Haul Tariffs of Provision for Spotting and Switching Services*

The district court concluded that the Commission's orders were defective in that they

> would require the plaintiff carriers to disregard and depart from the express provisions of their duly published and effective tariffs, and are therefore unauthorized and beyond

> the powers of the Commission under Section 6(7) of the Act, at least in the absence, as here, of any findings by the Commission that such tariff provisions themselves violate any section of the Act or are otherwise unlawful. [Concl. 11, R. 462.]

This conclusion suggests that the presence in the tariffs of unlawful provisions for switching and spotting operations without extra charge immunizes such provision against attack. That this is not the case is shown by *United States* v. *American-Sheet and Tin Plate Company, supra,* the first case dealing with *Ex Parte No. 104* proceedings. The tariffs involved in that case included allowances to shippers for certain functions performed by them which the Commission found not to be part of the carrier's responsibility. The argument was there made that "allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed" (301 U. S. at 406). This Court rejected the argument, pointing out that "These findings are an adjudication by the Commission that the spotting service within the appellees' plants is not transportation service" (301 U. S. at 407), and specifically held that the Commission is entitled to require discontinuance of the practice under Section 6(7) of the Act (*supra,* p. 15). This principle has been uniformly followed up to the time of the

decision below.[11] Its most recent application was in *Corn Products Refining Company* v. *United States*, 331 U. S. 790, where it was unsuccessfully contended that a tariff validated the carrier's practice of furnishing spotting service without additional charges. There, as here, the argument was that "the only issue * * * became whether the provisions of the tariff were just and reasonable" (Statement as to Juris., O.T. 1946, No. 1309, p. 18), and that a finding that the line-haul rates were unreasonable was therefore indispensable.

The principle that illegality of a transportation practice may not be cured by publishing it in tariff form is not new. A violation of law by a carrier furnishing to favored shippers switching service in excess of its legal obligation is not clothed with immunity by the fact that the carrier makes a public announcement plainly stating its unlawful intentions. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511; *B. & O. Railroad Co.* v. *United States*, 305 U. S. 507, 525-526.

C. The Power of the Commission to Require Separation of Line-Haul and Terminal Switching Charges under Section 6(7) of the Act

The district court concluded that the Commission's order "cannot be construed as requiring the

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[11] *United States* v. *Pan American Petroleum Corp.*, 304 U.S. 156, reversing 18 F. Supp. 624 (tariff aspect described in district court's opinion at 18 F. Supp. 628); *Inland Steel Co.* v. *United States*, 23 F. Supp. 291 (N.D. Ill.), affirmed, 306 U.S.

plaintiff carriers merely to state separately their line-haul charges and their terminal switching charges, since such orders are expressly based solely on Section 6(7) of the Act, which section *confers no such power* upon the Commission, and since the Commission has made no findings under Section 6(1) of the Act, under which section alone the Commission has power to require such separation of line-haul and terminal switching charges" (Concl. 9, R. 462; emphasis supplied).

The sweeping nature of this conclusion of law is apparent. *Ex Parte No. 104* and each of the 76 supplemental proceedings under it has been expressly rested on the power under Section 6(7) to prevent rebates or other illegal reductions in transportation rates. The Commission's method of attacking the problem has been to require that the transportation furnished at line-haul rates be limited to what it has found to constitute line-haul transportation. That method has resulted, necessarily, in requiring the carriers to state separately their charges for services additional to line-haul services. The court below has now for the first time held that this end result of segregation of rates cannot be attained under Section 6(7). In doing so it has placed its decision in irreconcilable

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153 (tariff aspect described in this Court's opinion only at 306 U.S. 158-159); *Anaconda Copper Mining Company* v. *United States*, 77 F. Supp. 611 (D. Mont.) (facts essentially similar to those in case at bar).

conflict with the principles laid down in *United States* v. *American Sheet and Tin Plate Co., supra*, at p. 406, and followed in every other case sustaining the Commission's orders under *Ex Parte No. 104*.

II

There Was Evidence to Support the Commission's Determination With Respect to the Point in Each Plant at Which Line-Haul Transportation Ended and Intra-Plant Service Began

The brief of the Commission in this case sets forth in some detail the nature of the evidence as to the points at which line-haul transportation began and ended, upon which the Commission issued its findings. Examination of the record and the reports of the Commission reveals that there was a large body of competent evidence, including maps and intensive studies by the Commission's own observers of traffic conditions at the various plants, to support the Commission's determinations. This Court has plainly stated that this question of fact, like other such questions, is to be determined by the Commission and that its findings will not be disturbed if supported by evidence. See *United States* v. *Wabash R. Co., supra*, at 321 U. S. 408.

CONCLUSION

For the reasons stated, the decree of the district court is erroneous and should be reversed with directions to dissolve the injunction which now restrains the enforcement of the Commission's orders.

Respectfully submitted,

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